DEPARTMENT OF THE AIR FORCE
USAF TRIAL JUDICIARY

UNITED STATES **v.** [redacted] **4th Security Forces Squadron** **Seymour Johnson AFB, NC (ACC)**	**DEFENSE MOTION TO DISMISS FOR UNLAWFUL COMMAND INFLUENCE & POTENTIAL PROSECUTORIAL MISCONDUCT** **26 APRIL 2013**

COMES NOW [redacted], by and through counsel, and respectfully requests this honorable court DISMISS the charges and specifications with prejudice, pursuant to Rule for Courts-Martial (RCM) 907, on the grounds of unlawful command influence and potential prosecutorial misconduct.

FACTS

1. On 29 Mar 13, the defense requested that the convening authority appoint Dr. Rodney Richards, Dr. Nancy Banks, or Dr. David Rasnick as a compensated expert consultant to assist the defense in case preparation. Additionally, the defense notified the convening authority that it considered "all individuals [to be] identified as Defense representatives under MRE 502" and requested a confirmatory order from the convening authority on this point. The defense informed the government that funding for the experts was to be coordinated with the Office of Medical and Scientific Justice (OMSJ), a 501(c)(3) non-profit organization, licensed to conduct private investigations. The request noted that Dr. Banks would "consult on the process involved in medically diagnosing a patient with HIV." (**Attachment 1**). The defense made no claim that Dr. Gregory Hendricks, who was not mentioned in the initial request to the convening authority, would be providing expert consultation on the treatment or diagnosis of HIV.

2. On 2 Apr 13, the defense provided to the court and the government a case-status update along with a copy of a letter from Mr. Clark Baker, CEO of the Office of Medical and Scientific Justice (OMSJ), a retired Los Angeles Police Department officer with thirty-plus years of investigative experience. This letter explained that OMSJ was assisting in [redacted] defense, and would be consulting with Dr. Gregory Hendricks in addition to Drs. Richards, Banks, and Rasnick. The letter explained these consultations were "necessary for an adequate defense of the charges."

3. With reference to Dr. Hendricks, the letter specified that

> Dr. Gregory Hendricks received a Ph.D. in nutritional biochemistry from the University of Vermont School (UV) of Medicine. He is currently an Associate Professor in the Department of Cell and Developmental Biology at the University of Massachusetts (U. Mass) Medical School. He has more than 35 years of experience in biological and materials electron microscopy (EM) and specimen preparation and teaches graduate and medical school courses in the Principles and

> Techniques of Biological Electron Microscopy. He has authored numerous scientific journal reports and books on EM. He designed and built the core electron microscopy facilities at UV and U. Mass. Dr. Hendricks has examined and photographed thousands of images of HIV since the 1980s and is expected to examine AB [redacted] plasma for visible evidence of HIV infection.

4. The letter did not state that Dr. Hendricks conducts tests for the purpose of medical diagnosis or treatment of AB [redacted], and the letter identified Dr. Hendricks as a Ph.D., rather than a treating or diagnosing physician. Also, the letter did not indicate any defense intent to qualify Dr. Hendricks as an expert in the process of diagnosing or treating HIV. (**Attachment 2**)

5. On 11 Apr 13, the defense filed a motion to compel, requesting an order for the government to perform a confidential blood draw according to certain protocols or, in the alternative, order the government to supply a physician's order for a blood draw that AB [redacted] could take to a civilian laboratory for testing. Attached to this motion, the defense provided the requested protocols. The protocol listed Dr. David Rasnick, not Dr. Hendricks as the point of contact, but requested that three tubes of blood be shipped to the University of Massachusetts Medical School, Department of Cell & Developmental Biology to the attention of Dr. Gregory Hendricks. In several places, the protocol requested that questions be referred to Dr. David Rasnick. The letter also directed that the laboratory performing the blood draw should be shipped to a "contract HIV viral load laboratory" used by the facility drawing the blood. The protocol did not state that Dr. Hendricks would be performing viral load testing. (**Attachment 3**)

6. On 16 Apr 13, the government secured an affidavit from Dr. Sheila Peel, Chief, Department of Laboratory Diagnostics and Monitoring, Walter Reed Army Institute of Research. Dr. Peel's affidavit did not discuss Dr. Hendricks, but did reference the defense request that blood be shipped to the University of Massachusetts Medical School, Department of Cell and Developmental Biology. Dr. Peel alleged that the facility "is not a Clinical Laboratory Improvement Amendments (CLIA) nor DoD Clinical Laboratory Improvement Program (CLIP) approved laboratory." Dr. Peel made various assertions about the requested defense consultants, not including Dr. Hendricks, that were supported by citations to Wikipedia. Notwithstanding this statement, Dr. Peel acknowledged that "[e]lectron micrographic studies are research techniques," but she went on to contend that they are not acceptable "as an aid to diagnosis of HIV infection." Dr. Peel intimated that she had participated in other courts-martial where OMSJ had been retained as an investigative consultant for the defense and alleged she could "deduce that the defense seeks to conduct electron micrograph studies of AB [redacted] plasma and present findings as proof that he is not infected with HIV." (**Attachment 4**)

7. On 18 Apr 13, the parties had an RCM 802 conference, where the defense gave notice of its intent to rebut Dr. Peel's assertions at the scheduled 3 May motions hearing, where the defense's motion to compel a blood draw would be considered along with other relevant motions. (**Attachment 5**) The government never, at this conference or otherwise, gave notice of its intent to contact Dr. Hendrick's academic department with assertions of impropriety.

8. Also on 18 Apr 13, the defense provided the government a discovery request related to Dr. Peel's affidavit. The memorandum requested (1) the transcript of any testimony Dr. Peel had

provided in court, along with any associated government or defense motion referencing her testimony and any related judicial order; and (2) all specific statutory or regulatory citations or journal or periodical references upon which Dr. Peel relied in making the claims in her affidavit. (**Attachment 6**)

9. On 22 Apr 13, the government denied the defense's discovery request for material related to Dr. Peel's affidavit. (**Attachment 7**) That same day, the government emailed Jeanne Lawrence, Ph.D., Professor and Interim Chair of Cell and Developmental Biology, University of Massachusetts, that the UMASS "Core Electron Microscopy Facility may have been employed in the past to accomplish HIV testing of human blood samples for treatment or diagnostic purposes." The subject of this email was entitled "Misuse of Core Electron Microscopy Facility." The government represented to Dr. Lawrence that its facility "cannot lawfully accomplish electron microscope testing for the abovementioned purposes as it is not a CLIA or DOD CLIP-approved laboratory." (**Attachment 8**)

10. In the email, the senior trial counsel represented he was "detailed to represent the United States in an upcoming court-martial." Senior trial counsel also represented that OMSJ had made requests for testing in the past and that it was "an organization dedicated in this context to denying the link between HIV and AIDS and challenging the adequacy of FDA-licensed HIV testing." Senior trial counsel asked Dr. Lawrence to "clear up the confusion" if he had made a mistake. In closing his email, senior trial counsel attached the protocols that the defense had included in its motion to compel blood testing, and said he did "not know whether [Dr. Hendricks] has served as the contact for OMSJ in the past or accomplished testing for OMSJ in the manner described above." Senior trial counsel indicated he had "contact information for the Chancellor of the School of Medicine and other senior staff at the University" but "thought" he should contact Dr. Lawrence first.

11. A few hours later, Dr. Lawrence emailed directors of the UMMS EM Core Facility, cc'ing senior trial counsel. The email expressed Dr. Lawrence's concern that—based on senior trial counsel's assertions—the UMMS EM Core Facility may have "done HIV testing of human blood samples for purposes that may be unlawful." Dr. Lawrence intimated that she had called senior trial counsel and received his "permission" to forward the directors the email sent earlier. Dr. Lawrence's understanding of what senior trial counsel said to her was that "it may not be necessary to involve Greg Hendricks (Facility Manger), *but that you could do so if you feel it is necessary to resolve the issue*" (emphasis added). Dr. Lawrence requested that the facility directors "resolve whatever the questions are" that senior trial counsel raised. (**Attachment 8**)

12. Dr. George B. Witman, one of the recipients of Dr. Lawrence's email, followed up while cc'ing the senior trial counsel, promising to "look into this matter." Senior trial counsel emailed Dr. Whitman, saying "thank you for the help." (**Attachment 8**) The government did not contact the defense to inform it that the government had assisted in initiating an investigation into Dr. Hendrick's conduct at the UMMS EM Core Facility.

13. On 23 Apr 13, OMSJ received notice from Dr. Hendricks that he was being investigated by the administration at UMMS, based on senior trial counsel's email to the faculty. Dr. Hendrick's understanding from Dr. Lawrence was that an Air Force JAG officer had emailed, threatening to

shut down the facility due to lack of certification and that Dr. Hendrick's was unlawfully providing diagnostics and treatment for HIV and AIDS. Based on the investigation triggered by senior trial counsel, Dr. Hendricks indicated he could not accept any more samples for testing or analysis for cases where OMSJ was providing investigative support. (**Attachment 9**) The defense immediately contacted the government and inquired whether it had sent emails to Dr. Hendrick's supervisors at UMMS. The senior trial counsel confirmed he had sent the email. Undersigned defense counsel informed the government that it was requesting the email in discovery and expressed concern that the government knew or reasonably should have known that its conduct would have a chilling effect on Dr. Hendrick's cooperation in assisting the defense. Senior trial counsel indicated he would check with his chain of command about releasing the email, indicating he foresaw a motion to disqualify him in the case. Defense counsel indicated he was unsure of what relief would be appropriate or requested from the court as the damage was still being assessed.

14. At 0954 on 23 Apr 13, senior trial counsel provided the email he sent to UMMS. (**Attachment 8**) Later that day, OMSJ attempted to reach out to Dr. Hendricks, who indicated he was "all lawyered up here now so I can't discuss this any further." (**Attachment 9**)

15. Senior defense counsel contacted senior trial counsel via telephone and indicated he was very concerned about what had occurred, and again expressed that senior trial counsel's actions would have a chilling effect on the defense's access to witnesses and the ability to present a defense. Senior trial counsel expressed to senior defense counsel that it was his duty to investigate this situation fully. Senior defense counsel responded that it was likewise his duty to assess how senior trial counsel's actions had affected AB [redacted] and asked what information or law had senior trial counsel reviewed before suggesting that what Dr. Hendricks had done in past cases at UMMS may be unlawful. Senior trial counsel replied that he did not know the specific law, but that his expert, Dr. Peel, in conversation and her affidavit, said it was unlawful for UMMS to be performing the testing. Senior defense counsel informed the senior trial counsel that the defense would be appealing to the court for appropriate relief.

16. After that conversation, senior trial counsel continued to press the government's inquiry with UMMS, contacting Mr. James Healy, J.D., Associate Vice Chancellor for Management, UMMS. Although this time senior trial counsel cc'd the defense, he represented to Mr. Healy that "the government is writing for information related" to its initial inquiry into the alleged unlawful activity, listing three specific questions for Mr. Healy to answer. (**Attachment 10**)

17. On 24 Apr 13, senior defense counsel called senior trial counsel and requested that he cease his inquiries at UMMS for the same reasons that both undersigned defense counsel and senior defense counsel had previously expressed on 23 Apr 13. Senior trial counsel, in this conversation, indicated he was relying on the Public Health Act and the section regarding CLIA which defined a laboratory. Senior trial counsel indicated his intent to comply with the defense's request at this point, and stated that assistant senior trial counsel would also be briefed on the defense's request. Even so, the government has made no written guarantee to the defense that it will remediate the damage done by its initial inquiries at UMMS, nor has it provided a retraction to UMMS or apologized to Dr. Hendricks for making the assertions against him. UMMS continues to investigate the assertions that senior trial counsel made, and Dr. Hendricks is no

longer consulting with OMSJ on AB [redacted] behalf. Dr. Hendrick's had previously agreed to testify telephonically at the 3 May motion hearing explaining the scientific methods he would use to support the defense, and had also indicated his willingness to assist at trial once testing was complete. Because of senior trial counsel's actions, that is no longer the case.[1]

LAW

18. The right of an accused "to call witnesses in one's own behalf ha[s] long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S 284, 294 (1973). Actions by the government impugning that right can amount to prosecutorial misconduct and unlawful command influence, warranting dismissal of the charge. *See infra*. "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). In determining whether dismissal of charges against an accused is appropriate, courts will "consider[] the legal norm violated by the prosecutor and determine[] if its violation actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Id.* (citations omitted). The highest service appeals court has held that "[s]everal legal norms are violated when a trial counsel attempts to or unlawfully dissuades a defense witness from testifying at a court-martial." *Id.* (discussing various legal norms implicated by such conduct).

19. Article 37(a) provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial." In *Meek*, the court specifically referenced Article 37(a), indicating that prosecutorial misconduct could "if done with the requisite intent" rise to the level of a "military … criminal offense." *Id.* The court did not, however, require a showing of specific intent or a criminal offense to prove prosecutorial misconduct. *See id.* (holding "such [prosecutorial] conduct towards a defense witness, if done with the requisite intent, can be both a military and civilian criminal offense"). Likewise, *Meek* noted that it has been held that action "directed against prospective defense witnesses" can constitute unlawful command influence where "it transgresses the accused's right to have access to favorable evidence." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (citing U.S. Const. amend. VI; Article 46, UCMJ); *see also Meek*, 44 M.J. at 7 (discussing *Thomas*).

20. In order to establish actual unlawful command influence, an accused must "(1) allege sufficient facts, which if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness …. The same three-pronged analysis would apply to an allegation of unlawful interference with access to witnesses." *United States v. Strombaugh*, 40 M.J. 208, 211-13 (1994) (noting a difference between "unlawful interference … that is private in nature and influence that carries with it the mantle of official command authority"); *see also United States v. Mann*, 50 M.J. 689, 700 (A.F. Ct. Crim. App. 1999) (holding that "[i]nterference with an accused's access to witnesses is a form of unlawful command influence, when done under the

[1] The defense sent a discovery request to the government about this situation on 23 Apr (**Attachment 11**). Late in the evening on 25 Apr, the government provided a response that we have included for consideration (**Attachment 12**).

mantle of command authority"); *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (holding that an SJA "generally acts with the mantle of command authority").

21. In *Meek*, the court cited to Rule 3.4 of the Navy version of the Rules of Professional Conduct when discussing legal norms relevant to a finding of potential prosecutorial misconduct. *See Meek*, 44 M.J. at 7. The Air Force version, which is substantially similar, provides: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence …. A lawyer shall not counsel or assist another person to do any such act" (AIR FORCE RULES OF PROFESSIONAL CONDUCT, Rule 3.4(a) (17 Aug 05)).

22. The *Meek* court further cited to the ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.2(b), which provides that a prosecutor should not use a rights advisement "for the purpose of influencing the witness in favor or against testifying." *Meek*, 44. M.J. at 6. The Air Force has adopted similar standards, providing that a "prosecutor should not improperly discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give the defense information which such person has a right to give." AIR FORCE STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.1(c) (15 May 05); *see also* RCM 701(e) (discussion) ("Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying truthfully before a court-martial or as a threat of retribution for such testimony").

23. The discussion section of Standard 3-3.1 notes that "… trial counsel must not induce a [witness's] refusal to speak with the defense." *Id.* (discussion) (citing *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990); *United States v. Morris*, 24 M.J. 93 (C.M.A. 1987)) (additional citations omitted).

24. In finding that the unlawful command influence concept applies to interference with witnesses favorable to the defense, the highest military court has held "we have repeatedly condemned unlawful command influence directed against prospective witnesses." *United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004). The "military judge is the 'last sentinel' to protect the court-martial from unlawful command influence." *Id.* The military judge has "authority and the duty" to "protect the servicemember from unlawful command influence." *Id.* A military judge's decision to dismiss charges due to the taint of unlawful command influence will be reviewed for an abuse of discretion. *Id.* at 187. "Where an error can be rendered harmless, dismissal is not an appropriate remedy." *Id.* Dismissal is appropriate, however, "when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings. *Id.* In *Gore*, the court sustained a military judge's finding that dismissal was the appropriate remedy where an accused "was deprived of the favorable testimony" of a witness due to unlawful command influence. *Id.*

BURDEN OF PROOF

25. Pursuant to RCM 905(c)(2)(A), the defense as the moving party has the burden of proof. The standard of proof on any factual issue necessary to decide a motion is by a preponderance of the evidence. *See* RCM 905(c)(1). In the context of an unlawful command influence motion,

however, the defense's initial burden of production "is low," but must be "more than bare allegations and speculation." *United States v. Calamita*, 48 M.J. 917 (A.F. Ct. Crim. App. 1998). Once there has been a "colorable showing of unlawful command influence, the burden shifts to the government to either disprove the existence of unlawful command influence by clear and convincing evidence, or prove beyond a reasonable doubt that the unlawful command influence did not affect the findings or the sentence. *Id.* (citations omitted).

ARGUMENT

26. At the outset, the defense is aware of its responsibilities under the AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY, Rule 5 ("We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel."). Unfortunately, the defense believes it is compelled to raise these issues on behalf of AB [redacted] due to the prosecution's conduct, and its prejudice towards AB [redacted] defense. To do otherwise would, in our opinion, potentially amount to ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Davis*, 52 M.J. 201 (C.A.A.F. 1999). The defense arrived at this conclusion after careful circumspection and consultation, and made a concerted effort not jump to conclusions in the initial report of the prosecution's conduct to the court. The defense is asking the court to undertake a full inquiry into the prosecution's conduct and draw its own conclusions.

27. The defense respectfully contends that the court should dismiss the charges against AB [redacted] based upon the government's interference with his right to present witnesses and evidence in his defense. Since at least 2 Apr 13, the government has been aware that the defense anticipated and was arranging for Dr. Hendrick's assistance. A reasonable prosecutor would be on notice that contacting the department chair of a professor and specifically identifying Dr. Hendrick's would have a chilling effect on his cooperation. The prosecution's email used words such as "misuse" and "unlawful" that reasonably suggested malfeasance, and senior trial counsel cloaked his email in the mantle of authority by stating he "represent[ed] the United States."

28. The government may contend that it acted in good faith to investigate suspicions raised by its consultant, Dr. Shelia Peel. Even if Dr. Peel's affidavit raised a need for outside investigation by the government, it was unnecessary to contact Dr. Hendrick's academic supervision. If its sole purpose was to determine whether Dr. Hendrick's lab possessed certain certifications, it could have performed a simple web search for the words "CLIA" and viewed the Centers for Medicare & Medicaid Services website (http://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/index.html [last accessed 25 Apr 13]). There are state agency contacts listed on the website. A simple inquiry whether a certain lab had received a CLIA certification, without reference to Dr. Hendricks, OMSJ, or this court-martial, would have likely yielded the information the government sought. The government could have performed its own open-source research to determine the relevance of CLIA certification.[2]

[2] Dr. Peel's references to the DoD Clinical Laboratory Improvement Program (CLIP), *see* DoDI 6550.2, are irrelevant because AB [redacted] is not seeking a DoD health evaluation by the military, rather he is trying to defend against a court-martial.

29. This assumes that Dr. Peel's assertions, which are without citation except for references to Wikipedia, were well-founded and sufficient that a reasonable government counsel would have relied on them to launch the inquiry that senior trial counsel triggered. A relatively brief search on the same website, however, reveals that "The Centers for Medicare & Medicaid Services (CMS) regulates all laboratory testing **(except research)** performed on humans in the U.S. through the Clinical Laboratory Improvement Amendments (CLIA)" (emphasis added). The defense's requests in this case were abundantly clear that they were research oriented, in connection with preparation for a court-martial, rather than a clinical test for medical treatment or diagnosis. Potentially, Dr. Peel lacks sufficient legal training to understand the distinction, but the senior trial counsel's past training and experience, coupled with the defense's pleadings in this court-martial (which stated Dr. Banks would evaluate the medical diagnosis, *not* Dr. Hendricks), should have made it abundantly clear that the assistance of Dr. Hendrick's was research-related in connection with a court-martial investigation.

30. The manner in which senior trial counsel handled this issue and the effects it has had on this case raise concerns that this court must address. The defense has never indicated that it was part of its defense to deny the existence of HIV or AIDs, yet the government specifically raised this argument with academics at a major research institution, coupled with the words "misuse" and "unlawful." Dr. Lawrence did exactly what a reasonable prosecutor would have expected a similarly situated department chair to do—she immediately opened up an internal inquiry, asking officials to "resolve whatever the questions are" that the senior trial counsel raised. Dr. Lawrence's email made clear that Dr. Hendricks would be included within the inquiry. Senior trial counsel did nothing to attempt to shield Dr. Hendricks from the inevitable scrutiny that would come from his assertions. In fact, senior trial counsel's email intimated that if Dr. Lawrence did not act immediately, he had the contact information of senior officials at the university. Any reasonable prosecutor would understand that language to imply he would "take things to the next level" if he did not receive a satisfactory follow-up to his inquiry.

31. Up to this point, the government had not informed the court, nor had it informed the defense of what it was doing. At minimum, however, on the morning of 23 Apr 13, when defense counsel contacted the government and asked for the email in discovery, explicitly cautioning the government that it either knew or reasonably should be aware of a potential chilling effect from its actions, the government was on notice of the need to reverse course and initiate remedial action. A second cautionary call was made later that day by senior defense counsel, but senior trial counsel ignored the warning and continued to press the government's inquiry with Mr. James Healy, Associate Vice Chancellor for Management at UMMS.

32. The following morning, senior defense counsel called again and explicitly requested that the government halt its action, but the damage was already done. Due to intimidation from the specter of an internal investigation, unnecessarily and unilaterally caused by senior trial counsel's emails, Dr. Hendricks informed OMSJ he would not accept any more samples for testing until the inquiry had been resolved and he could not talk about the matter further because he had "lawyered up."

33. Mr. Baker's attached affidavit demonstrates what Dr. Hendricks would have done for the defense, had the government not prompted his employer to perform an investigation into his past assistance with OMSJ. Dr. Hendricks, who has written textbooks on the preparation and analysis

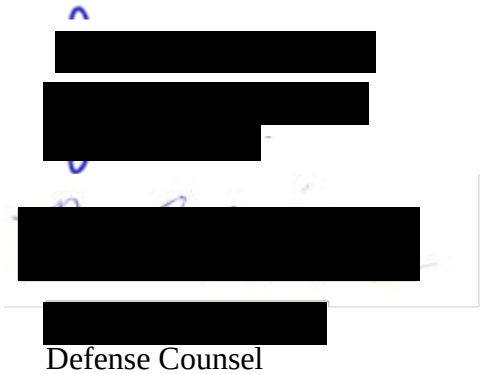
of viral specimens for electron microscopy and has provided Transmission Electron Microscope (TEM) analysis on thousands of pathogens, would have examined AB [redacted] blood to determine if he could see evidence of HIV or other virus-like particles in the sample. Dr. Hendricks would have written a report on his research to be reviewed by the defense in this case, and had agreed to be available for trial should the results of the test fail to reveal evidence of HIV. Although the government could challenge this evidence at trial, Dr. Hendricks' research and expected testimony would certainly have been exculpatory evidence. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). Due to the prosecution's actions, AB [redacted] is "unable to obtain comparable evidence by other reasonably available means," *United States v. Garries*, 22 M.J. 288, 292 (C.M.A. 1986). Scientists in Dr. Hendricks' field of specialty are not widely abundant, and his willingness to perform research in support of a court-martial involving assertions of aggravated assault due to HIV exposure is uncommon. The defense is aware of no other expert who would be willing to perform the requested test.

34. Although the remedy of dismissal is unusual, it has been employed in cases where unlawful command influence has prejudiced the accused's right to present witnesses. *See, e.g, Gore*, 60 M.J. at 187 ("dismissal of charges is permissible when necessary to avoid prejudice against the accused"). The actions of the government justify the sanction of dismissal here.

CONCLUSION

Before the government's conduct, the defense had arranged pro bono assistance from Dr. Hendricks, a respected researcher in his field, who would have presented evidence that raised doubt about the validity of the government's evidence. Scientists as respected as Copernicus and Galileo have been attacked for their research, and the defense was prepared for a hard battle over the inferences to be drawn from the evidence in this case. Instead of giving AB [redacted] his day in court, however, trial counsel used language that removed Dr. Hendricks from the equation, thus tipping the scales in the government's favor. The court is one of the last forums where individuals can receive equal justice under the law, unfettered by unlawful command influence and potential prosecutorial misconduct. As the government's actions have prevented a fair trial in this case, the defense respectfully requests that the court dismiss the charges.

Respectfully submitted,



Defense Counsel

CERTIFICATE OF SERVICE

We certify that we served a copy of this Defense "DEFENSE MOTION TO DISMISS FOR UNLAWFUL COMMAND INFLUENCE & POTENTIAL PROSECUTORIAL MISCONDUCT" on the trial counsel and military judge on 25 Apr 13 via electronic mail.

[redacted]

Defense Counsel

29 March 2013

MEMORANDUM FOR THE CONVENING AUTHORITY

FROM: AFLOA/ADC (Capt [redacted])

SUBJECT: Request for Confidential Expert Consultant in Forensic Medicine, *United States v. AB* [redacted]

1. Pursuant to Rule for Courts-Martial (RCM) 703(d), the Defense respectfully requests that the convening authority appoint Dr. Rodney Richards, Dr. Nancy Banks, or Dr. David Rasnick as a compensated expert consultant in the field of forensic medicine to assist the Defense in the preparation of its case. The Defense intends to consult with these experts in anticipation of litigation as a representative of the Defense within the meaning of Military Rule of Evidence 502. Even if the appointment for purposes of compensation is denied, we request that they be identified specifically as Defense representatives. We are not designating these individuals as expert witnesses, although information discovered through consultation is anticipated to result in them becoming witnesses at a later time. The Defense has coordinated with a representative of these experts and believes they are qualified for the purposes we are seeking. The Defense notes that we are only requesting funding for one of the consultants, but request designation of all individuals identified as Defense representatives under MRE 502. The CV of each individual is attached, along with a fee schedule that applies for the appointment of one of the experts as a compensated consultant.

2. **Law**: Service members are entitled to expert assistance when "necessary for an adequate defense." The military accused has the resources of the Government at his disposal to pay for this assistance. *United Stats v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986) *cert. denied* 479 U.S. 985 (1986). The Defense must, of course, demonstrate the necessity for the services.

Applicable military case law has established a three-prong test to determine the necessity of a requested expert consultant. Those three prongs are: (1) Why is the expert needed?; (2) What would the expert accomplish for the defense?; and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop? *See United States v. Ford*, 51 M.J. 445, 455 (1999) (quoting *United States v. Gonzalez*, 39 M.J. 459, 461 (1994)); *see also United States v. Ndanyi*, 45 M.J. 315, 319 (1996). According to *United States v. Turner*:

> An expert may be of assistance in two ways. The first is as a witness to testify…[A]n expert may also be of assistance to the Defense as a consultant to advise the accused and his counsel as to the strength of the government's case,…to suggest questions to be asked of prosecution witnesses, evidence to be offered by the Defense, and arguments to be made.

Turner, 28 M.J. 487 (CMA 1989).

"Necessary" means reasonably necessary, and an "adequate defense" includes, among other things, preparation for cross-examination of the Government witnesses and any Government expert. *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976). The Defense must show more than a "mere possibility" of assistance from a requested expert. *United States v. Robinson*, 39 M.J. 88, 89 (C.M.R. 1994). There must be a reasonable probability both that the expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial. *Id.* The Defense must be specific enough in defining the issues it hopes to develop with expert assistance and must demonstrate that we have sufficiently educated ourselves as to such potential issues. A Defense Counsel who seeks the services of an expert consultant should show whatever cards it either thinks it holds or may acquire with such expert assistance. *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989).

"Neither the convening authority nor a military judge is required to provide the defense with the particular expert it requests," but "where expert assistance is necessary for the defense, the government can deny the requested expert only if it provides an adequate substitute." *United States v. Warner*, 62 M.J. 114, 115 (C.A.A.F. 2005). The Defense

is entitled to experts who have professional qualifications "at least reasonably comparable" to those of any of the Government's experts. *Id.* at 120.

An adequate substitute, if appointed, must "be willing to testify to the same conclusion and opinions" as the requested expert. *United States v. Robinson*, 24 M.J. 649, 652 (N.M.C.M.R. 1989). "To find otherwise would be to effectively foreclose the accused from obtaining favorable expert testimony to counter Government experts testifying against him at trial and would surely amount to a denial of the 'raw material integral to the building of an effective defense.'" *Id.* (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)).

In *Robinson*, it was deemed reversible error to provide an accused an "adequate substitute" based on the trial counsel's representations that the substitute would testify to the same "concepts" as the requested defense expert. This was deemed a "far cry" from the legal requirement that the expert would testify to the same conclusions as the defense-requested witness. *Id.* at 654. The representation that the government proffered substitute would testify to the "same things" was insufficient unless the government appointed substitute would testify in the "same way." *Id.*

3. **Relevant Factual Background**: The Government has alleged that AB [redacted] committed an aggravated assault upon three individuals with means likely to produce death or grievous bodily harm, specifically engaging in sexual contact with them while he was infected with Human Immunodeficiency Virus (HIV). At the Article 32 investigation, the government called an expert in infectious diseases that opined that AB [redacted] was infected with HIV. Portions of AB [redacted] medical records were referenced in the Article 32 report to conclude that AB [redacted] had HIV. The government's expert also opined about various clinical techniques and diagnostic tools that are used to diagnose an individual as infected with HIV.

4. **Basis for Request**:

The Defense requests the assistance of one of the three identified experts in forensic medicine. Expert assistance is needed because this case involves clinical techniques and interpretation of assessing when one is infected with HIV. The experts will assist the Defense by helping us understand the complex testing technologies used to diagnose HIV in patients, diagnostic practices, clinical analysis of results, and issues for cross-examination of Government experts. This assistance is necessary for the Defense to properly prepare for trial.

The Government must prove that at the time of the alleged offenses, AB [redacted] was HIV+, and that such infection presents a risk of grave bodily harm or death. In doing so, the prosecution must produce documentary, testing, and witness testimony as to the test(s) performed, the results, and an interpretation and diagnosis of the results. The Defense, therefore, as a matter of discovery and preparation has to have the opportunity to review and evaluate the specific tests and testing processes, procedures and technology of HIV used to support a diagnosis, therefore an expert consultation is necessary. In addition, the expert would be tasked to review and evaluate the HIV tests and medical diagnosis for the purpose of assisting the Defense with purported diagnosis of HIV+.

In order to prepare an effective defense, we must prepare to challenge the Government's evidence, and present possible alternative expert testimony regarding the medical diagnosis and interpretation of testing results. The facts surrounding AB [redacted] medical status makes the evaluations by the requested expert witnesses relevant and critical to the preparation of a defense. The defense expects the prosecution to present test results taken in advance of the allegations. The nature of the test results, including how the test was developed, designed, and constructed, whether the test performs as advertised, whether the test was used correctly on AB [redacted] sample, and other complicated technical and scientific questions will be substantive issues at trial. Our requested experts will conduct a comprehensive review of all the discovery evidence in order to make a learned analysis. Based on the Defense team's self-education to date, there is information suggesting that AB [redacted] diagnosis of HIV+ is legally insufficient. Preliminary conversations with a representative of these experts indicate this anticipated testimony, but additional discovery is required from the Government which the experts will assist in reviewing and analyzing. Without the expert's consultation, the Defense's theory of the case will be essentially dead in the water because confirming our concerns about the sufficiency of the evidence requires expert consultation and potentially testimony at trial.

5. **Anticipated Duties of Expert Consultant**: The Defense anticipates an expert will perform the following roles, including, but not limited to:

a. Determine whether there is legally sufficient evidence that AB [redacted] was, at the time of the alleged offenses, HIV+.

b. Dr. Rasnick and Dr. Richards will be able to advise the Defense about the testing technologies design and limitations, and whether the use of those tests can establish beyond a reasonable doubt that AB [redacted] is infected with HIV. Dr. Rasnick and Dr. Richards participated in the development, design, production, and testing of the technology used in the tests at issue. Accordingly, these experts offer AB [redacted] a defense incapable of being produced by nearly all other scientists and medical doctors. Dr. Banks will consult on the process involved in medically diagnosing a patient with HIV.

c. Assist the Defense in identifying possible defenses to the case, with a specific focus on the testing technologies and process of medical diagnosis used in AB [redacted] case, along with developing discovery and the Defense's theory of the case.

d. Assist the Defense in interviewing and developing cross examination for the various Government witnesses. The effective cross examination of Government witnesses requires that counsel be knowledgeable in this complex area. Information provided by an expert in advance of trial, as well as their assistance provided to the defense as a result of their in-court observation of any Government witness, including any expert's testimony in the field of biology and chemistry, will help the defense counsel prepare effective cross-examinations. Employing one of the requested experts allows them to analyze the evidence and testimony, and thereby, prepare the expert to testify at trial with little or no delay in the proceedings.

e. Assist the Defense in determining whether the infection of HIV, under current medical technology, presents a risk of grave bodily harm or death. This is an inquiry which has been left open for litigation by the highest military appeals court. *See generally United States v. Weatherspoon*, 49 M.J. 209, 212 (1998) (noting that in most HIV cases "it was uncontested that death was the natural and probable consequence if the virus was transmitted and the victim developed AIDS").

6. **Why Counsel Cannot Perform Such Duties**: No member of the Defense team has the academic background or practical experience to perform the necessary analysis noted in the paragraphs above. Additionally, no member of the Defense has any training in the fields of forensic medicine, biology, chemistry, or virology, nor could any member of the Defense, in a reasonable time period, attain the necessary level of professional certification to render such an opinion. Undersigned counsel has not tried an HIV-related aggravated assault. Civilian assistant defense counsel has experience in cases of these types, but relies principally on the requested experts due to the complexity of the anticipated issues. No matter how many hours are spent reading about HIV testing and diagnosis, there is no way to replicate the hands-on clinical learning necessary to adequately analyze the medical and chemical evidence in this case, and then critically distinguish it from the Government's anticipated case. Additionally, reviewing a treatise or journal articles cannot provide the clinical experience needed to credibly assist and testify on the subject of HIV testing and medicine. The requested expert consultation may lead to a decision that Defense Counsel wants the expert to testify as an expert witness at trial. If expert testimony is ultimately required for the Defense, we clearly cannot present the evidence ourselves.

7. **Adequate Substitute**: The Defense is aware that the law allows appointing an adequate substitute under certain circumstances. At this point in time the Defense is focusing on the necessity of an expert. If the Government proposes an alternative, the Defense will inquire as to the alternative's sufficiency. At minimum, a substitute would need experience working with HIV testing regimes, sophisticated knowledge of the chemical and biological components of the various testing regimes, medical expertise in diagnosing HIV, as well as extensive experience with the evolution of HIV detection and diagnosis. The unique nature of this case requires the specific education and experience of the experts proposed by the Defense.

8. **Cost**: The requested experts coordinate funding for travel with the Office of Medical and Scientific Justice (OMSJ), a 501(c)(3) non-profit organization based in California. These experts have assisted in several military cases in the past. Generally funding has been handled through OMSJ at the rates incorporated in the attached fee schedule. It is estimated that pretrial review of the evidence and discovery will take approximately ten hours at the

rate of $400 per hour. The Government and Defense have estimated that trial in this case will last approximately five days. In the event further services are required, the Defense will make a supplementary request.

9. We believe we have established the necessity of the requested assistance to the proper representation of the accused, and respectfully ask that you respond to this request as soon as possible. Your favorable consideration of this request is greatly appreciated. Please contact us DSN 722-5345 if you have further questions or concerns regarding this request.

[redacted]
[redacted], Capt, USAF
Area Defense Counsel

I hereby certify that on 29 March 2013 I served a copy of the foregoing Request for a Confidential Expert Consultant in Forensic Medicine on the trial counsel.

[redacted]
[redacted], Capt, USAF
Area Defense Counsel

Attachments:
1. CV Dr. Rasnick, 6 pgs
2. CV of Dr. Richards, 4 pgs
3. CV of Dr. Banks, 3 pgs
4. OMSJ Fee Schedule for Consulting Experts, 1 pg

DAVID RASNICK, Ph.D.

[redacted] [redacted]

WORK EXPERIENCE:

January 2012-Present

Writing a popular version of *The Chromosomal Imbalance Theory of Cancer*.

January 2009-December 2011

The Chromosomal Imbalance Theory of Cancer, Science Publishers-CRC Press, Dec 2011.

March 2008-January 2009

Founded Chromosome Diagnostics, to introduce into the USA a highly accurate cancer diagnostic system developed in Germany. Venture went out of business when economy crashed late 2008.

Sept. 2006-January 2008

Revived Boveran, Inc. in Grand Bahama Island. Not able to obtain sufficient funding to continue.

March 2005-June 2006

Senior Researcher with the Dr. Rath Health Foundation Africa, based in South Africa. We worked closely with government and non-governmental organizations to promote natural approaches to health and disease. We have demonstrated that proper diet supplemented with vitamins and micronutrients can reverse the course of AIDS-defining diseases in chronically poor, malnourished South Africans.

March 2000-Sept. 2004

Founder of Boveran, Inc., Chief Science Officer. Developed automated fluorescence in situ hybridization (FISH) to count chromosomes in patient specimens to diagnose cancer in the high-throughput clinical labs. Boveran applied the aneuploidy-cancer work that Peter Duesberg and I have been doing at UC Berkeley.

August 1997-Present

DATE Analysis. I invented DATE analysis, which stands for Differentiation, Adaptation, Transformation, Evolution. DATE analysis is a general theory of biological transformation. It differs from metabolic control analysis in that its essential task lies in the *comparison* of related phenotypes rather than in the precise definition or description of each. In place of the daunting prospect of tracking the kinetic particulars of thousands of individual cellular components, DATE analysis considers their aggregate effects. DATE analysis demonstrates the principle that it is the fraction (γ) of the genome undergoing deferential expression (not the magnitude (π) of the deferential expression) that controls phenotypic transformation. The first use of DATE analysis provided powerful theoretical support for the 100 year-old hypothesis that the autocatalyzed progression of aneuploidy *is* carcinogenesis. DATE analysis has also been used to explain the Hayflick limit of cultured cells, the time-course of carcinogen-induced tumors in mice, the age distribution of human cancer, multi-drug resistance, the lack of immune surveillance protecting against cancer, and the failure of cancer chemotherapy. DATE analysis was

applied to published microarray data on embryonic development and differentiation, adaptation to stress, transformation (cancer), and evolution. None of the non-cancer work has been published yet.

June 1996-June 2005

Visiting Scholar, Dept. Molecular & Cell Biology, UC Berkeley. In Duesberg's lab I extended the method of Kacser and Burns for the analysis of complex biological systems at steady state to systems at least as complex as a cell up to the whole organism to explain the persistence and robustness of cancer. I call the new method DATE analysis and have used it to investigate the aneuploidy theory of cancer. I presented the foundations of DATE analysis at a NATO conference in Hungary in April 1999. We have published a number of papers on the aneuploidy theory of cancer. January 2004, Peter Duesberg and I organized a meeting, termed the 1st Conference on Aneuploidy and Cancer: Clinical and Experimental Aspects. It brought together about 70 cancer researchers at the Waterfront Plaza Hotel in Oakland. The conference evaluated the theory that aneuploidy is sufficient to cause cancer.

Jan. 1996-May 1996

Group Leader Cysteine Protease Inhibitors, Arris, South San Francisco, CA. Arris acquired Khepri December 1995. I and the majority of Khepri personnel were retained by Arris following the acquisition. Group leader is a senior position at Arris. I was responsible for a group of organic chemists, charged with inventing proprietary inhibitors of cysteine proteases that have been associated with a spectrum of tissue destroying pathologies: arthritis, cancer, osteoporosis, and infectious diseases. I helped plan the animal model studies. As a result of the acquisition, I negotiated a severance package and left Arris May 15.

1993-1995

Head of Chemistry for Khepri Pharmaceuticals, South San Francisco, CA. I setup an organic chemistry laboratory, hired chemists, initiated research programs in arthritis, cancer, osteoporosis, and infectious diseases. I directed the research efforts of the chemistry group in the design and synthesis of protease inhibitors as potential therapeutic agents. We used the latest technology: X-ray structures, homology modeling, and computer aided inhibitor design. My department also provided the organic chemistry synthesis support for many other projects throughout the company.

1991-1992: **Teacher for US Peace Corps in Papua New Guinea**

1988-1990

Director of Chemical Research for Prototek, Inc., Dublin CA. I negotiated a $4 million deal with Marion Laboratories to develop my fluoro ketone protease inhibitors as potential arthritis drugs. I directed all of the scientific aspects of the fluoro ketone arthritis project jointly undertaken between Prototek and Marion Laboratories. I put together at Prototek a team consisting of: production manager who established a GMP facility to synthesize kilogram quantities of the fluoro ketone compounds that were required for the toxicological and pharmacological evaluations necessary for FDA approval; a manager of quality assurance and control responsible for ensuring that all specifications for FDA compliance were established and met; a specific R/D facility to explore the scope of the fluoro ketone technologies.

I was also responsible for the direction of the R/D activities in the following areas: metastatic cancer, AIDS, parasitic diseases (e.g. malaria), coagulation, immunology, emphysema, antiviral agents, muscular dystrophy, and organ preservation.

1985-1988

Manager of the protease inhibitor project at Prototek, Inc. Responsibilities included: the technical and managerial direction of the protease inhibitors project—the design, synthesis, characterization and evaluation of the inhibitors; identify and hire personnel and consultants; contact pharmaceutical firms about the prospects of licensing our technology; defining and managing the budget; and finally, publish scientific data.

1980-1985

Production manager of Enzyme Systems Products (ESP). Dr. Robert Smith and I re-established ESP in Dublin, CA February 1981. The company was involved in primary research, development, and production of research and clinical materials. We developed a series of new fluorescent substrates useful in assaying the activities of a host of hydrolytic enzymes: proteases, glycosidases, mono oxygenases, phosphatases, and the like. Many of these materials have been patented. The dyes synthesized were derivatives of coumarins, quinolines, quinolones, styryl quinolines, and various complex heterocyclic compounds.

In addition to developing detecting groups, we invented a novel substrate approach which was exquisitely selective for assaying cysteine protease activity in the presence of other classes of proteases. We designed a number of reversible and irreversible inhibitors of both serine and cysteine proteases which we included in our catalog. The area of protease inhibitors was a specialty of ESP; several were evaluated for potential use as therapeutics.

1978-1980

Diagnostics Division of Abbott Laboratories. I was one of two chemists hired to establish the chemistry group in the Diagnostics Division. Responsibilities included: setting up the chemistry laboratory; hiring staff; and principally, identifying new opportunities for the application of synthetic organic chemistry to clinical diagnostic problems. In addition to directing the work of subordinates, I conducted research on the design of inhibitors and substrates for a variety of hydrolases and reductases with applications to diagnostics.

EDUCATION: 1975-1978

I received my doctorate from the Georgia Institute of Technology under the guidance of Professor James C. Powers. Professor Powers is recognized as an authority in the field of synthetic protease inhibitors. My work was primarily directed toward the design and synthesis of protease inhibitors. The result was the development of the first metalloendoprotease affinity label. My graduate work also included the development of a continuous assay for bacterial collagenase activity. I have a B.S. in chemistry and a B.S. in biology also from Georgia Tech.

OTHER ACTIVITIES

Jan 31-Februry 3, 2008

2nd Conference on Aneuploidy and Cancer

Peter Duesberg and I held the second conference on aneuploidy and cancer.

January 23–26, 2004

1st Conference on Aneuploidy and Cancer

Peter Duesberg and I organized a meeting, termed the *1st Conference on Aneuploidy and Cancer: Clinical and Experimental Aspects*. It brought together about 70 cancer researchers at the Waterfront Plaza Hotel in Oakland. The conference evaluated the theory that aneuploidy is sufficient to cause cancer. The abstracts or short papers of the participants are recorded in the *Scientific Program & Abstracts* booklet of the conference, which is available on request from the conference bureau at ssachs@uclink.berkeley.edu. An independent meeting report has since also been published (Steinberg D. Appraising aneuploidy as a cancer cause. *The Scientist* **18** 26-7, 2004). A meeting report has also been published by the organizers (Duesberg, P, Li, R., Rasnick, D, Meeting Report: Aneuploidy Approaching a Perfect Score in Predicting and Preventing Cancer: Highlights from a Conference Held in Oakland in January 2004, *Cell Cycle* **3**(6) 823-828, 2004). The proceedings of the conference will appear in *Cell Oncology*.

May 2000-2008

Advisor to the president of South Africa, Thabo Mbeki, and member of his AIDS Advisory Panel.

PUBLICATIONS

David Rasnick *The Chromosomal Imbalance Theory of Cancer: the autocatalyzed progression of aneuploidy is carcinogenesis*, Science Publishers-CRC Press, 330 pages (2011).

P. H. Duesberg, D. Mandrioli, A. McCormack, J. M. Nicholson, **D. Rasnick**, C. Fiala, C. Koehnlein, H. H. Bauer, M. Ruggiero "AIDS since 1984: No evidence for a new, viral epidemic—not even in Africa" Ital J Anat Embryol 116 (2), 73-92 (2011).

David Rasnick "DATE Analysis: A general theory of biological change applied to microarray data" Biotechnology Progress 25 (5), 1275-1288 (2009).

David Rasnick *Germ of Lies*, lulu.com (2008).

D. Rasnick and C. Fiala "But—What about Africa?" *AIDS AND THE MEDIA : AN ONLINE CONFERENCE*, **http://www.redflagsweekly.com/conferences/aids/2004_apr28.html,** April 28, 2004.

D. Rasnick "The biotechnology bubble machine" Nature Biotechnology 21 (4), 355-356 (2003).

S. Mhlongo MD, MRCS, MRCGP; C. Fiala MD; E. de Harven MD; **D. Rasnick** PhD; G. T. Stewart MD, "HIV a sexually transmitted disease? An analysis of the latest antenatal screening for HIV and syphilis from South Africa" International Journal of STD & AIDS 14 (8) 574 (2003).

P. Duesberg, C. Koehnlein, and **D. Rasnick** "The chemical bases of the various AIDS epidemics: recreational drugs, anti-viral chemotherapy and malnutrition" Journal of Bioscience 28 (4): 383-412 (2003).

R. Li, D. **Rasnick** , P. Duesberg: Correspondence re: D. Zimonjic et al., ("Derivation of human tumor cells in vitro without widespread genomic instability, Cancer Research 61, 8838-8844, 2001.) Cancer Research 62: 6345-6349 (2002).

D. Rasnick "Aneuploidy theory explains tumor formation, the absence of immune surveillance and the failure of chemotherapy" Cancer Genetics Cytogenetics 136 (1), 66-72 (2002).

P. Duesberg, R. Stindl, R. Li, R. Hehlmann, and **D. Rasnick "**Aneuploidy versus gene mutation as cause of cancer," Current Science 81, 490-500 (2001).

David Rasnick *La vera storia dell' AIDS*, Spriali, Milano (2001).

S. L. Biroc, S. Gay, K. Hummel, C. Magill, J. Palmer, D. Spencer, S. Sa, J. Klaus, **D. Rasnick**, and R. E. Gay "Cysteine Protease Activity is Up-Regulated in Inflamed Ankle Joints of Rats with Adjuvant Induced Arthritis and Decreases with *In Vivo* Administration of a Vinyl Sulfone Cysteine Protease Inhibitor." Arthritis and Rheumatism 44 (3), 703-71 (2001).

P. Duesberg and **D. Rasnick** "Aneuploidy, the somatic mutation that makes cancer a species of its own," Cell Motility and Cytoskeleton 47, 81-107 (2000).

D. Rasnick "Auto-catalyzed progression of aneuploidy explains the Hayflick limit of cultured cells, carcinogen-induced tumours in mice, and the age distribution of human cancer," Biochemical Journal 348, 497-506 (2000).

R. Li, A. Sonik, R. Stindl, **D. Rasnick**, and P. Duesberg "Aneuploidy versus gene mutation hypothesis: recent study claims mutation, but is found to support aneuploidy," Proceedings of the National Academy of Sciences (USA) 97, 3236-3241 (2000).

P. Duesberg, R. Li, **D. Rasnick,** C. Rausch, A. Willer, A. Kraemer, G. Yerganian, and R. Hehlmann "Aneuploidy precedes and segregates with chemical carcinogenesis," Cancer Genetics and Cytogenetics 119, 83-93 (2000).

D. Rasnick and P. Duesberg "Metabolic control analysis shows how aneuploidy causes cancer," in Technological and Medical Implications of Metabolic Control Analysis (Cárdenas, A. J. C.-B. a. M. L., ed.), pp. 99-107, Kluwer Academic Publishers, Dordrecht (2000).

P. H. Duesberg, R. Li, C. Rausch, G. Yerganian, R. Hehlmann, **D. Rasnick** "Mechanism of carcinogenesis by polycyclic hydrocarbons: aneuploidy precedes transformation and is found in all tumours" in Technological and Medical Implications of Metabolic Control Analysis Cornish-Bowden, A. & Cardenas, M. L., ed., pp. 83-98 Kluwer Academic Publishers, Dordrecht (2000).

P. Duesberg, **D. Rasnick**, R.Li, L. Winters, C.Rausch, R Hehlmann, "How aneuploidy may cause cancer and genetic instability," *In:* What is cancer?, R. Root-Bernstein and W. Den Otter (eds.), Theories on carcinogenesis, Kapandriti, Greece: Anticancer Research 19, 4887-4906 (1999).

D. Rasnick and P. H. Duesberg, "How Aneuploidy Affects Metabolic Control And Causes Cancer," Biochemical Journal 340, 621 (1999).

P. H. Duesberg, C. Rausch, **D. Rasnick**, and R. Hehlmann, "Genetic Instability of Cancer Cells is Proportional to Their Degree of Aneuploidy." Proceedings of the National Academy of Sciences (US) 95, 13692-13697 (1998).

P. H. Duesberg and **D. Rasnick**, "The AIDS Dilemma: Drug Diseases Blamed on a Passenger Virus," Genetica 104, 85-132 (1998).

P. H. Duesberg and **D. Rasnick**, "The Drug-AIDS Hypothesis." revised version in Continuum, Spring (1997).

P. H. Duesberg and **D. Rasnick**, "The Drug-AIDS Hypothesis." A preliminary version appeared in International Journal of Medicine 1, 26 (1997).

D. Rasnick, "Kinetics Analysis of Consecutive HIV Proteolytic Cleavages of the Gag-Pol polyprotein." The Journal of Biological Chemistry 272, 6348 (1997).

D. Rasnick, "Small Synthetic Inhibitors of Cysteine Proteases." Perspectives in Drug Discovery and Design 6, 47 (1996).

Y. Wang, **D. Rasnick,** J. Klaus, D. Payan, D. Brömme, D. Anderson, "Nucleophile labeling of cysteine and serine protease substrates." The Journal of Biological Chemistry 271, 28399 (1996).

P. J. Rosenthal, J. E. Olson, G. K. Lee, J. T. Palmer, J. L. Klaus, and **D. Rasnick**, "Antimalarial Effects of Vinyl Sulfone Cysteine Proteinase Inhibitors." Antimicrobial Agents and Chemotherapy 40, 1600 (1996).

D. Brömme, J.L Klaus, K. Okamoto, **D. Rasnick,** J.T. Palmer, "Peptidyl Vinyl Sulfones: A new class of potent and selective cysteine protease inhibitors." Biochemical Journal 315, 85 (1996).

J.T. Palmer, **D. Rasnick,** J.L. Klaus, D. Brömme "Mechanism-Based Cysteine Protease Inhibitors." Journal of Medicinal Chemistry 38, 3193 (1995).

P. J. Rosenthal, W. S. Wollish, J. T. Palmer, **D. Rasnick** "Antimalarial Effects of Peptide Inhibitors of a *Plasmodium Falciparum* Cysteine Proteinase," J. Clinical Invest. 88, 1467 (1991).

E. Krepela, P. Vesely, A. Chaloupkova, D. Zicha, P. Urbanec, **D. Rasnick**, J. Vicar "Cathepsin B in Cells of Two Rat Sarcomas with Different Rates of Spontaneous Metabolism," Neoplasma 36, 529 (1989).

P. J. Rosenthal, J. H. McKerrow, **D. Rasnick**, J. H. Leech "*Plasmodium Falciparum* Inhibitors of Lysosomal Cysteine Proteinases Inhibit a Trophozoite Proteinase and Block Parasite Development," Molec. and Biochem Para. 35, 177 (1989).

R. E. Smith, **D. Rasnick**, C. O. Burdick, K. Cho, J. Liao, and A. Piethe "Visualization of Inactivation of Human Tumor Cathepsin B Isozymes by a Peptidyl Fluoromethyl Ketone Using a Fluorescent Print Technique," Anticancer Research 8, 525 (1988).

C. J. F. VanNoorden, R. E. Smith, and **D. Rasnick** "Cysteine Proteinase Activity in Arthritic Rat Knee Joints and Effects of a Selective Systemic Inhibitor," J. Rheum. 15, 1525 (1988).

J. G. DeLuca, G. R. Dysart, **D. Rasnick**, and M. O. Bradley "A Direct Highly Sensitive Assay for P450 Catalyzed O-Deethylation Using a Novel Coumarin Analog," Biochem. Pharmacol. 37, 1731 (1988).

D. Petrova-Skalkova, E. Krepela, **D. Rasnick**, and J. Vicar "A Latent Form of Cathepsin B in Pleural Effusions, I: Characterization of the Enzyme in Breast Cancer Patients," Biochem. Med. Metab. Biol. 38, 219 (1987).

E. Krepela, J. Bartek, D. Skalkova, J. Vicar, **D. Rasnick**, J. Taylor-Papadimitrion, and R. C. Hallowes "Cytochemical and Biochemical Evidence of Cathepsin B in Malignant, Transformed and Normal Breast Epithelial Cells," J. Cell Science 87, 145 (1987).

C. F. Venicill, **D. Rasnick**, K.V. Crumley, N. Nishino, and J. C. Powers "*Clostridium Histolyticum* Collagenase: Development of New Thioesters, Fluorogenic, and Depsipeptide Substrates, and New Inhibitors," Biochemistry 24, 3149 (1985).

D. Rasnick, "Synthesis of Peptide Fluoromethyl Ketones and the Inhibition of Human Cathepsin B," Anal. Biochem. 149, 461 (1985).

J. R. Garrett, K. Kyriacon, **D. Rasnick**, and R. E. Smith, "A New Direct Fluorescent Method for Protease Histochemistry Using Amino Styryl-Quinoline as Leaving Group," J. Microscopy 136, RPI (1984).

D. Rasnick and J. C. Powers "Active Site Directed Irreversible Inhibition of Thermolysin," Biochemistry 17, 4363 (1978).

Rodney M. Richards

[redacted]

Education

PhD in Organic Chemistry, University of Colorado at Boulder. Title of dissertation: "Synthesis of Molecular Cylinders and Moebius Strips."	1978-1982
MS in Organic Chemistry, University of Denver, Denver CO. Title of dissertation: "The Reaction of Desyl Chloride with Phenylhydrazine: A Study of Osazone Formation."	1974-1977
BS in Chemistry, University of Denver, Denver CO.	1969-1973

Employment/Professional Experience

Amgen, Inc. Boulder, CO 1982-1995
- Research Scientist (1982-1987)
- Senior Research Scientist (1987-1995)

National Transfer and Register Corp, Westminster, CO 1988-1993
- Board of Directors

Richards Land Management LLC, Louisville, CO 1995-1998
- Owner/Manager

Consultant, Louisville, CO 1996-1997
- Expert witness DNA fingerprinting (forensics)

Independent Research, Louisville, CO 1996-2007
- Computer Modeling (Cellular Communication)
- Community Educator: HIV/AIDS, Hepatitis C
- Expert witness HIV diagnostic testing

Apro Bio Pharmaceutical Corp. Greenwood Village, CO 2007-2008
- Director of Corporate Scientific Operations

Rocky Mountain Biopharmaceutical, Inc. 2008-present
- Co-founder/ Chairman of the Board
- Senior Scientific Director
- Chief Technology Officer

Research Experience

Nucleic Acid Synthesis, gene synthesis and assembly, molecular cloning and recombinant protein expression. Designed and synthesized novel Interferon gene, approved by FDA in 1997 for treatment of Hepatitis C infection.	1982-1984
Developed sensitive non-radioactive nucleic acid clinical diagnostic assays for detection of infectious diseases.	1984-1988
Developed novel nucleic acid amplification technologies Including a test for HIV DNA equal in sensitivity to PCR. Also developed technologies to eliminate false positive signals.	1988-1992
Synthesis and screening of combinatorial nucleic acid and protein libraries to assist in drug discovery.	1992-1995
Independent research scientist: Expert witness DNA forensic and HIV diagnostic testing.	1995-2007
Director of Corporate Scientific Operations: Coordinated and monitored Corporate sponsored research and intellectual property development at the University of Colorado Denver Health Science Center, Denver Veterans Affairs Medical Center and Colorado State University.	2007-2008
Co-founder Rocky Mountain Biopharmaceutical, Inc. Currently developing corporate bylaws, business plans, licensing arrangements and intellectual property positions.	2008-present

Community Activities

Invited Speaker. A two-day program on AIDS/HIV: Virus theory and the immune system. CUNY Gratuate Center Health Fair. New York City, NY. September 2001.

Invited Speaker. Testing, Testing: A critical look at so-called "HIV" tests. AIDS Reality Check. Los Angeles, CA. October 2001.

Invited Speaker. What you and your doctor need to know about HIV tests. Health Education AIDS Liaison. San Diego, CA. October 2001.

Invited Speaker. What you and your doctor need to know about HIV tests. Alive & Well. Los Angeles, CA October 2001.

Invited Speaker. A Behind the Scenes View: The Struggle To Get An Alternative View On Health Published. Gilpin Street Holistic Center; Denver, CO. November 2001.

Guest speaker. Should You Bet Your Life On an HIV Test? Vital facts every woman needs to know. Women's Aids Reality Movement. San Francisco, CA. March 2003.

Invited Speaker. Viral Disease: From discovery to diagnosis. A community workshop sponsored by The Nature Institute. Ghent, NY. October 17, 2003.

Invited Speaker. Viral Disease: From discovery to diagnosis. A community workshop sponsored by the Holistic Healing Institute, Seattle, WA. November 15, 2003.

Invited speaker. HIV/AIDS: A Deeper Look. A workshop sponsored by Mothering Magazine. Santa Fe, NM. April 2004.

Television Interview. Whats behind the failings in Public Health Policies. "On the Edge" with Jonas Moses. Chicago, Il. May 24, 2008.

Radio Interview. WBAI, New York - 99.5 FM Pacifica Radio – The Caldwell Chronicles, NYC, NY. July 11, 2008.

An interview with Rodney Richards. The Communicators, with Leroy Baylor WHCR 90.3 FM. The Voice of Harlem. Harlem, NY. July 20, 2008

Publications

1. Richards RM. "The reaction of desyl chloride with phenylhydrazine: A study of osazone formation." *A thesis presented to the faculty of the Graduate School of Arts and Sciences of the University of Denver*. Denver, Colorado, 1977.
2. Walba DM, Richards RM, Sherwood SP and Haltiwanger RC. A strategy for the synthesis of cylindrical macropolycyclic hosts with hydrophilic interior surfaces: Crown ether rings fused by the tetrahydroxymethylethylene (THYME) unit. *J Am Chem Soc* 1981; 103: 6213-15.
3. Walba DM, Richards RM and Haltiwanger RC. Total synthesis of the first molecular Moebius strip. *J Am Chem Soc* 1982; 104:3219-21.
4. Richards, RM. "A strip-strategy for the synthesis of molecular cylinders and Moebius strips: Crown ether rings fused by the tetrahydroxymethylethylene (THYME) unit." *A thesis presented to the faculty of the Graduate School of the University of Colorado*. Boulder, Colorado, 1984.
5. Walba DM, Armstrong III JD, Perry AE, Richards RM, Homan TC and Haltiwanger RC. The THYME Polyethers; an approach to the synthesis of a molecular knotted ring. *Tetrahedron*, 1986; 42:1883-94.
6. Walba DM, Richards RM, Hermsmeier M and Haltiwanger RC. Conformational properties of the TYHME polyethers. The Bis-THYME Cylinder: A three-dimensional analog of 18-Crown-6. *J Am Chem Soc* 1987; 109, 7081-
7. Walba DM, Homan TC, Richards RM and Haltiwanger RC. Topological stereochemistry. 9. Synthesis and cutting "in half" of a molecular Moebius strip. *New J Chem* 1993; 17:661-81.
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9. Richards RM and Jones TJ. Method and reagents for detecting nucleic acid sequences. Australian Letters Patent 220108; Filed June 16, 1989; Granted July 26, 1993.

10. Richards RM, Jones T, Snitman DL and Brown GS. Method for reducing carryover contamination in an amplification procedure. US Pat. 5427929; Filed May 3, 1993, Issued Jun 27, 1995.
11. Richards RM. Enzymatic synthesis of oligonucleotides. US Patent 5,645,987; Filed June 5, 1995; Issued July 8, 1997.
12. Richards RM and Jones TJ. Method and reagents for detecting nucleic acid sequences. International Patent WO/1989/01296; Published August 1, 1990; Granted October 23, 1996.
13. Richards RM. Enzymatic synthesis of oligonucleotides. International Patent WO/1992/005287; Published September 9, 1992; Granted April 16, 1997.
14. Richards RM. Enzymatic synthesis of oligonucleotides. US Patent 5,650,271; Filed April 1, 1993; Issued July 22, 1997.
15. Richards RM, Jones T, Brown GS. Method for reducing carryover contamination in an amplification procedure. US Patent 5,650, 302; Filed June 5, 1995; Issued July 22, 1997.
16. Richards RM, Jones T, Snitman DL and Brown GS. Method for reducing carryover contamination in an amplification procedure. International Patent WO/1991/017270; Published April 22, 1992; Granted September 10, 1997.
17. Richards RM. Diagnostic kits for detection of target nucleic acid sequences. US Patent 5,863,732; Filed Dec 18, 1996; Issued January 26, 1999.
18. Richards RM, Jones T, Snitman DL and Brown GS. Method for reducing carryover contamination in an amplification procedure. US Patent 5,876,976; Filed Jan 23, 1995; Issued March 2, 1999.
19. Richards RM, Jones T, Snitman DL and Brown GS. Method for reducing carryover contamination in an amplification procedure. US Patent 6,037,152; Filed Jan 23, 1995; Issued March 14, 2000.

PROFESSIONAL EXPERIENCE

Consultant physician, private practice — 1984 - 2000
Obstetrics and Gynecology, Nyack, New York

Attending Physician

Nyack Hospital — 1984 - 2000
Nyack, New York

Admitting Physician

Columbia Presbyterian Medical Center — 1998 - 2000
New York, New York

Consulting Physician

Mt. Sinai Hospital — 1984 -1990
New York, New York

Director of Outpatient Gynecology

North General Hospital — 1984 - 1986
New York, New York

Consulting Physician
for the Port Authority at the World Trade Center

World Trade Center — 1985 - 1986
Bldg. 2
New York, New York 2

EDUCATION

Pace University 1996
White Plains, New York
Master of Business Administration - Finance

Harvard Medical School 1978
Boston, Massachusetts
Medical Doctor

Fellowship from the American College of Surgeons 1978
Surgery and Tropical Medicine
Benin Hospital, Benin, Nigeria

Hunter College 1974
New York, New York
Bachelor of Arts, cum laude

POST GRADUATE TRAINING

Columbia University St. Luke's Hospital Center
New York, New York
General Surgery

The Mount Sinai Hospital
New York, New York
Obstetrics and Gynecology

The Memorial Sloan Kettering Cancer Center
New York, New York

Galloway Fellow
Department of Surgery, Gynecology Service

BOARD CERTIFICATION

Fellow of The American College of Obstetricians and Gynecologists

PUBLICATIONS

AIDS, Opium, Diamonds and Empire, the Deadly Virus of International Greed (Universal, 2010) - Gold Medal Winner, gold medal for "the most progressive health book," by the Independent Publisher Book Awards, 2011

LICENSE

New York State

MEMBERSHIPS AND ASSOCIATIONS

- American College of Obstetricians and Gynecologists
- American Medical Women's Association
- National Medical Association
- American Holistic Medical Association
- Physicians for Social Responsibility
- New York State Medical Society
- Rockland County Medical Society
- Board member, Nyack Hospital
- Board member, Rockland County Cancer Society
- Board member, Rockland County United Way

CONSULTING FEE SCHEDULE

CONSULTANT:

Initial Consultation – no charge

Case Review with Written Analysis: **$250.00/hour**

Depositions/Arbitration/Trial: **$250.00/hour**
$2000.00/full day

Travel expenses: (Paid in accordance w/Fed Gov't Travel Regs)

Travel time: $100/hour

MEDICAL or SCIENTIFIC Expert: (MD/PhD)

Initial Consultation – no charge

Review and analysis of medical and/or scientific records, charts, lab reports, microscopic glass slides and materials

$400.00/hour

Depositions/Arbitration/Trial: **$800.00/hour**

Travel expenses: (Paid in accordance w/Federal Gov't Travel Reg's)

Travel time: $400/hour

All payments made to OMSJ, Inc. (DUNS#94-199-9505)

2 April 2013

MEMORANDUM FOR THE HONORABLE COURT (Lt Col [redacted])

FROM: OMSJ (Clark Baker, CEO)

SUBJECT: Explanation of OMSJ Participation in *United States v.* [redacted]

1. I understand that the court has asked Capt. [redacted] to provide a more detailed explanation of the Office of Medical and Scientific Justice's (OMSJ) relationship as a representative of the defense in the above-captioned case, along with an explanation of our ability to assist AB [redacted] in the anticipated court-martial once scheduled. I am providing this letter in a good faith in an attempt to more fully satisfy the court's query.

2. I am the Founder, Chief Executive Officer and Principal Investigator for OMSJ. I am a retired member of the Los Angeles Police Department and a licensed private investigator with 30+ years of investigative experience. OMSJ is a Los Angeles-based 501(c)(3) non-profit corporation that provides pro bono investigative services for cases that, we believe, involve the use of evidence compromised by medical and scientific corruption. Our organization has provided CLE training to public defenders and investigators on the subject of criminal HIV defense. OMSJ's HIV Innocence Group (HIG) has successfully assisted in dozens of HIV-related cases since October 2009. We have assisted in several military cases, although to date our assistance has primarily been used by the Marine Corps, Navy and Army.

3. OMSJ assists the military accused by reviewing discovery, providing interpretation of complex scientific data, identifying areas where counsel should request more discovery, evaluating medical tests, performing our own independent testing when appropriate, assisting in preparing for cross-examination of government experts, preparing affidavits by our team of experts to be used in pretrial motions or requests for alternative disposition such as a discharge in lieu of trial by court-martial, and providing expert testimony.

4. Our assistance generally centers around problems related with testing and diagnosis of HIV. Despite ubiquitous marketing, "HIV tests" do not detect HIV or HIV antibodies. Despite clearly marked warnings from the FDA, test manufacturers, and laboratories, clinicians often rely upon these unreliable tests to diagnose HIV and prescribe toxic "black box" drugs to their healthy asymptomatic patients. Our experts can also provide testimony for the court and finder of fact that will be helpful in determining whether, under prevailing and published medical science, the alleged exposure to HIV presents a risk of grave bodily harm or death, a question that has not been definitively answered by military courts in a non-guilty plea case since *United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998); *see also United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008) (Ryan, J., concurring) ("I write separately on a point that Appellant chose to admit, rather than litigate at trial, and which is thus unnecessary for the majority opinion to address. In my view, as a matter of first impression, it would not appear that the statutory element—"means or force likely to produce death or grievous bodily harm"—should be satisfied where the record shows that the likelihood of death or grievous bodily harm from a particular means is statistically remote.").

5. Defending HIV aggravated assault allegations involves complex questions of medical science. Even seasoned counsel cannot hope to be prepared to challenge the government's evidence without the assistance of experts who have training and expertise in these sorts of cases. Since 2009, OMSJ's team of experts has provided medical, legal and scientific support to scores of attorneys such as Capt [redacted] Based on OMSJ's preliminary review of the government's evidence, we believe that the consultation of Doctors Rodney Richards Ph.D., Nancy Banks MD, Gregory Hendricks Ph.D., and David Rasnick Ph.D. is necessary for an adequate defense of the charges.

- Dr. Rodney Richards has a Ph.D. in organic chemistry from the University of Colorado at Boulder. He supervised the development of several diagnostic technologies, which resulted in a novel diagnostic test for the detection of genetic material known as DNA/RNA, unique to the HIV. This technology proved to be equal in sensitivity and specificity to a competing technology known as the Polymerase Chain Reaction (PCR), which is used routinely for the determination of what has become known as the HIV viral load levels. He has also developed technologies to eliminate false positive signals in HIV testing. Dr. Richards has testified in numerous trials. In AB [redacted] case, Dr. Richard's will evaluate the testing technologies used to diagnose AB [redacted] as HIV+ and opine as to the design and limitations of such technology, and whether the use of those tests can establish, beyond a reasonable doubt, that AB [redacted] is infected with HIV.

- Dr. Gregory Hendricks received a Ph.D. in nutritional biochemistry from the University of Vermont School (UV) of Medicine. He is currently an Associate Professor in the Department of Cell and Developmental Biology at the University of Massachusetts (U. Mass) Medical School. He has more than 35 years of experience in biological and materials electron microscopy (EM) and specimen preparation and teaches graduate and medical school courses in the Principles and Techniques of Biological Electron Microscopy. He has authored numerous scientific journal reports and books on EM. He designed and built the core electron microscopy facilities at UV and U. Mass. Dr. Hendricks has examined and photographed thousands of images of HIV since the 1980s and is expected to examine AB [redacted] plasma for visible evidence of HIV infection.

- Dr. Nancy Banks has a M.D. from Harvard Medical School and is a Fellow of the American College of Obstetricians and Gynecologists. Dr. Banks has years of experience in a clinical setting diagnosing HIV, and will evaluate the process the Air Force used in medically diagnosing AB [redacted] with HIV, and opine as to whether generally accepted medical principles of diagnosis were followed.

- David Rasnick has a Ph.D. in bio-organic chemistry from the Georgia Institute of Technology. Dr. Rasnick currently serves as OMSJ's Chief Science Officer. He is currently writing a popular version of his recently published book for cancer researchers: *The Chromosomal Imbalance Theory of Cancer* (2011), ISBN-10: 1578087376. He has studied HIV and AIDS for more than 30 years, has published numerous reports in scientific journals and presented at numerous international scientific conferences and, at the invitation of then-President Thabo

Mbeki of South Africa, Dr. Rasnick participated as an expert member of the 2000 Presidential AIDS Advisory Panel of South Africa. He has more than twenty years of experience in the pharmaceutical and biotech industries where he developed clinical diagnostics and conducted research on therapeutic drugs for cancer, emphysema, arthritis, and parasitic diseases. Dr. Rasnick's relevant experience relates to the development of clinical diagnostics and pharmaceutical research. In the AB [redacted] case, Dr. Rasnick will oversee the collection, transfer and delivery (chain-of-custody) of the blood samples that are expected to be collected and tested. Although there is some overlap of expertise between Doctors Richards and Rasnick, both are necessary in this case.

6. Because of the complex nature of a defense to an HIV aggravated assault prosecution, the expertise of all of these individuals is necessary to present a complete defense, and no one expert can provide the necessary knowledge to adequately consult on the universe of medical and scientific problems associated with an HIV prosecution. OMSJ maintains a relationship with the above-mentioned experts, who contract with us to provide assistance at the rates Capt [redacted] has previously provided to the convening authority. Even with compensation from the convening authority, OMSJ generally provides the expertise of these consultants at a financial loss that we attempt to make up through our donor base. We provide this service to individual defendants such as AB [redacted] consistent with our mission and available resources.

7. Due to our limited resources, unless all four of our experts are funded by the convening authority, we cannot financially bear the burden of assisting in more than one criminal trial a month. The limitation is due to the cost of assembling the aforementioned expert team and coordinating their availability while balancing their other commitments, civilian jobs, teaching, and ongoing medical or scientific research. To date, we have commitments in trials through the end of July 2013, and are available for a trial beginning at any point after 5 Aug 13. We currently have availability in May because a scheduled case settled, however, our ability to support a trial or litigated motion hearing is dependent upon timely provision of discovery that Capt [redacted] has previously requested, with sufficient time to analyze the data and perform necessary scientific testing. In past cases, adequate preparation has taken approximately a month from the date that full discovery was provided. Because of the holistic approach our team takes to reviewing evidence, it is not adequate to review discovery piecemeal as provided by the government. Rather, it is necessary to receive a complete response to our discovery request so that an efficient review may be conducted.

8. Our current caseload projected as accurately as we can at this point includes the following:

Date	Location	Client
Apr	Clayton Co, GA	DAVIS, Craig Lamar
May	-	-
Jun 13-21	Buffalo, NY	WILLIAMS, Nushawn
Jun 25-28	Boise, ID	RIVERA, Roland
Jul 9-12	Army, Colorado	[redacted]

Aug ?	Seymour Johnson AFB, NC	[redacted]
Sep 9~21	Winchester, UK	Queen v. Assumang

9. Capt [redacted] first contacted me on 21 Mar 13. After preliminary discussions, we entered into a confidentiality agreement on 22 Mar 13 with AB [redacted] consent. The details of this agreement involved an understanding that we would coordinate and consult with the above-named experts in anticipation of litigation, and assist in Capt [redacted] preparation for trial. We also coordinated consultation with attorney G. Baron Coleman, who regularly assists clients in cases where OMSJ is retained. Mr. Coleman has reviewed the case with Capt [redacted] and has agreed to assist on AB [redacted] behalf with the understanding that OMSJ is assisting in the case. OMSJ keeps Mr. Coleman on retainer so that our clients can have access to a seasoned HIV defense litigator due to the complex nature of these cases. We understand our assistance to Capt [redacted] and AB [redacted] to be confidential in nature as defense representatives and consultants within the meaning of the attorney-client privilege.

12. Please contact me at (323) [redacted] if you have any questions regarding the above letter.

Very respectfully,

CLARK BAKER CPI #26869
CEO, Principal Investigator OMSJ

CLINICIAN REQUEST

1. I have been informed that I am "HIV +."

2. Because of my uncertainty (and the seriousness) of this claim, I respectfully request that you order a twenty (20) ml blood draw from me as per the attached LABORATORY INSTRUCTIONS:

   - One-quarter (5 ml) for a new PCR test;

   - Three-quarters (15 ml) to be sent to the electron microscopy laboratory of my choice (see LABORATORY INSTRUCTIONS).

3. I understand that I cannot eat or drink anything (except water) for twelve (12) hours before the draw.

4. I understand that this additional blood sample and frozen delivery may incur additional costs. I am prepared to cover those costs and fees.

5. I respectfully request that you instruct your laboratory to prepare the samples as per the attached LABORATORY INSTRUCTIONS.

IF YOU HAVE QUESTIONS ABOUT THIS TESTING PROTOCOL, PLEASE CALL DR. DAVID RASNICK AT [redacted]

APPROVED YES ☐ NO ☐ (If NO, please explain):

CLINICIAN NAME_____DATE_____

FORM REVISION 2/12/2013 8:32 AM

Appellate Exhibit ____

CONFIDENTIAL

LABORATORY INSTRUCTIONS

1. Contact Dr. David Rasnick ([redacted] for instructions and a control number.
2. Prepare four (4) lavender-top blood collection tubes containing anti-coagulant EDTA or PPTTM tubes. (Do NOT use green-top Heparin tubes).
3. Label one tube **A** (OMSJ PCR) and the other three tubes **B** (OMSJ EM).
4. Collect 20 ml of peripheral blood from subject's arm, divided equally among the four-labeled tubes.
5. Collect plasma by centrifuging specimens within **two hours** of collection.
6. Transfer plasma from lavender-top tubes into screw-cap polypropylene tubes with the same label. (Do NOT use pop- or snap-top tubes.)

DO NOT ALLOW TUBES TO SIT AT ROOM TEMPERATURE FOR MORE THAN TWO HOURS.

HANDLING & SHIPPING PLASMA

DO NOT SHIP TUBES TO ARRIVE ON FRIDAYS, WEEKENDS, OR HOLIDAYS.

A (OMSJ PCR) **1 Tube**	**B (OMSJ EM)** **3 Tubes**
Freeze (–70ºC) tube **A (OMSJ PCR)** and ship on dry ice **overnight** to **your** contract HIV viral load laboratory. Direct your contract laboratory to **email or FAX** the HIV viral load results **ASAP** to Dr. David Rasnick at: [redacted]	Ship tubes **B (OMSJ EM)** on water ice (0ºC) overnight to: University of Massachusetts Medical School Dept. of Cell & Developmental Biology SA-114 55 Lake Avenue North Worcester, MA 01655 Attentio[redacted]

PLEASE DIRECT QUESTIONS TO DR. DAVID RASNICK [redacted].

DEPARTMENT OF THE ARMY
WALTER REED ARMY INSTITUTE OF RESEARCH
503 ROBERT GRANT AVENUE
SILVER SPRING, MD 20910-7500

REPLY TO
ATTENTION OF

MCMR-UWA-E 16 April 2013

AFFIDAVIT IN SUPPORT OF GOVERNMENT'S RESPONSE TO DEFENSE MOTION TO COMPEL BLOOD DRAW

I currently serve as Chief of the Department of Laboratory Diagnostics and Monitoring for the U.S. Military HIV Research Program located at Walter Reed Army Institute Research. I have been in my current position since 2010. In my position, I conduct Applied and Translation Research leveraging commercial and inter-agency partnerships for development, evaluation, deployment and implementation of next generation serological, molecular platforms, assays, and Point of Care devices for screening, diagnosis, and/or monitoring of HIV and related diseases. I serve as the HIV and related disease Clinical Diagnostic Consult for Infectious Disease Consultant for the U.S. Army Office of the Surgeon General. Also, since 2006, I have served as the College of American Pathologist (CAP) Laboratory Director for the HIV Diagnostic and Reference Laboratory, Department of Laboratory Diagnostics and Monitoring, U.S. Military HIV Research Program, Walter Reed Army Institute Research. In this position I direct and oversee the Department of Army HIV Force Screen Service Contract Laboratory, conduct all HIV supplemental confirmatory testing for all Active Duty Army, Army National Guard, and Army Reserve Soldiers, HIV-1 viral loads for HIV infected US Military Service personnel, and all HIV-1 Resistance Genotyping for therapeutic monitoring for all HIV infected active duty Service members. I have testified at one court-martial (US vs Pinkela), served as Expert Consultant in two additional US Army court martial cases, US vs McFarland; US vs [redacted] as well as for a Naval case, US vs Stevens, with similar charges to those in the present case. In each case, the Office of Medical and Scientific Justice (OMSJ) was employed by the defense as forensic consultants.

The Office of Medical and Scientific Justice (OMSJ) is an organization that denies that: 1) Human Immunodeficiency Virus (HIV) causes Acquired Immunodeficiency Syndrome (AIDS), 2) antiretroviral drugs are efficacious against the virus, and, 3) current US FDA licensed/approved/cleared assays can detect and/or be used as an aid in the diagnosis, or monitoring of individuals infected with HIV.

I reviewed the resumes of the proposed Expert Consultants and would non-concur with acceptance as Expert Witness/Consultants.

1. Dr. Nancy Banks (MD):
Dr. Bank's CV demonstrates absolutely no documented expertise or knowledge of serological or molecular HIV test methodologies, interpretation of HIV test results, diagnosis of HIV, nor documented expertise in the care and treatment of individuals infected with HIV. Resume indicates that Dr. Banks has not practiced medicine since 2000, and did so as an Attending Physician in Obstetrics and Gynecology, in Nyack, NY.

2. Dr. David Rasnick:
Has no documented expertise or knowledge of HIV test technologies. Last employment that involved clinical diagnostic research/employment was in 1978 at Abbott Laboratories Search of Dr. Rasnick includes information at http://en.wikipedia.org/wiki/David_Rasnick: His resume claims of Visiting Scholar status at Berkley have been denied by the University - see weblink above. While working with Matthias Rath of the Rath Foundation in South Africa, he (they) emphasized risks of antiretroviral therapy (ART) and urged HIV/AIDS patients to use vitamin and nutritional supplements rather than ART. The Treatment Action Campaign (TAC) of South Africa sued Rasnick and the Rath Foundation, claiming that the clinical trials conducted by Rasnick and Rath had not been approved by the appropriate South African authorities nor was the clinical protocol subjected to ethical review. In June 2008, the South African Cape High Court ruled against Rasnick and other defendants associated with the Rath Foundation, declaring their vitamin trials illegal and prohibiting the publication of false advertisements for vitamins. The Court also stated that health authorities in South Africa had an obligation to investigate and stop illegal activities of Dr. Rasnick and the Rath Foundation.

3. Dr Rodney Richards:
Dr. Richards holds a PhD in organic chemistry and has early documented expertise in molecular technologies. He holds a number of patents for carryover contamination in PCR amplification procedures. He does not, however, have current (since 1995), specific documented expertise in the development, application, or interpretation of serological and molecular HIV test methodologies, and/or interpretation of HIV test results

On 15 April 2013, I reviewed the Defense Motion to Compel Blood Draw in *United States v. AB* [redacted] requesting that the military judge order that AB [redacted]'s blood be drawn. Specifically, that one tube of his blood be shipped to the HIV viral load laboratory for the entity that draws the blood, and that one tube of his blood be shipped to the University of Massachusetts Medical School Department Cell and Developmental Biology. The defense request does not state which tests are to be performed on AB [redacted]s blood, rather it states that 5 ml of blood should be sent for a "new PCR" test , and that 15 mls of blood to be shipped to the University of Massachusetts Medical School, Department of Cell and Developmental Biology, electron microscopy laboratory.

Based on the defense motion, it appears the hospital where AB [redacted] went for the initial blood draw declined to collect the blood specimen without an order, request, or prescription from AB [redacted]'s Primary Care Physician (PCM). It also appears AB [redacted] PCM refused to provide the order, request, or prescription for the blood draw.

Based on the information provided in the defense motion, I identify no basis for U.S. Air Force medical professionals to direct the blood draw as proposed. The request for a confidential blood draw and/or the request to obtain a physician's order for the blood to be drawn were denied because the request is not the appropriate procedure for obtaining medical care through the military treatment facility (MTF) and through TRICARE. Medical professionals at the MTF

and a Medical Laboratory professional within the DoD find no evidence to question or doubt that AB [redacted] is infected with the Human Immunodeficiency Virus 1.

AB [redacted]'s blood was initially tested at the Air Force Epidemiology Laboratory at Wright-Patterson Air Force Base, Ohio. AB [redacted]'s blood specimen underwent further testing at the San Antonio Military Medical Center (SAMMC) in Texas. I have reviewed the testing on AB [redacted]'s test results from Wright-Patterson AFB, Ohio, and the laboratory results from SAMMC. Those tests unequivocally indicate that AB [redacted] was infected with HIV-1 on 21 July 2011.

I also reviewed the test results from AB [redacted]'s blood specimens collected as part of his medical treatment and determined that these results are consistent laboratory evidence for HIV infection. The following tests were performed: 1) ADVIA Centaur Enhanced HIV-1/O/2 chemiluminescence assay (Seimens Health Care Diagnostics) which was initially sero-reactive on 28 July 2011, repeat sero-reactive on 29 July 2011, and 2) Genetic Systems HIV-1 Western Blot (BioRad Laboratories, Inc) which was Positive on 01 August 2011. In addition, an FDA approved HIV-1 viral load test – a test which detects HIV-1 viral genetic material, ribonucleic acid (RNA) in a patient's plasma – detected and quantified HIV-1 RNA in AB [redacted]'s plasma at four independent test events: 19SEP11, 3024 copies per ml; 21FEB12, 9,563 copies per ml; 06AUG12, 11,338 copies per ml; and, on 04FEB13, 6,422 copies per ml. Based on the test results from the first test event (specimen collected on 21 July 2011) and the four independent HIV-1 viral load test events noted, the Air Force medical community has no reason to question AB [redacted]'s HIV infection diagnosis.

There is currently no cure for infection with HIV. Therefore, once HIV infected, an individual remains infected, although his/her infection can be medically managed. A "new PCR " test may or may not detect HIV-1 viral load in AB [redacted]'s plasma.

The US Air Force has a robust and well-established HIV program regulated by Air Force Instruction 48-135, *Human Immunodeficiency Virus Program, 12 may 2004 incorporating change 1 7 August 2006.* Compliance with this regulation is mandatory. Only approved MTF laboratories or USAF HIV Testing Services may be used to perform initial screening on Service members as per AFI48-135, A6.1.1. All repeatedly reactive specimens must be sent to USAF HIV Testing Services for supplemental/confirmatory testing per AFI48-135, A6.1.4. As per regulation, the Air Force will follow its program's procedures for managing AB [redacted]'s care and treatment post his 2011 HIV infection diagnosis.

An additional reason for opposing the confidential blood draw relates to the processes within TRICARE, the DoD's health insurance provider. Under TRICARE guidelines, a service-member is permitted to request a second opinion for medical diagnosis and treatments. The proper procedure for obtaining the second opinion is to obtain a referral to a specialist or practitioner in the area at issue. In this instance, the proper way to obtain a second opinion would be for AB [redacted] to request a second opinion and then obtain a referral to an HIV/Infectious Disease expert. In most cases, the referral occurs within the area where the

supporting MTF is located. Naturally, dependent upon the location of the home station the individual could be referred some distance from their home station, but to a provider in the TRICARE network, and most likely within the local area.

In this case, the defense is requesting another sample of AB [redacted]'s blood be shipped to the University of Massachusetts Medical School, Department of Cell and Developmental Biology, electron microscopy laboratory, which is not a Clinical Laboratory Improvement Amendments (CLIA) nor DoD Clinical Laboratory Improvement Program (CLIP) approved laboratory. Further more, AB [redacted] is assigned to Seymour Johnson Air Force Base in North Carolina, a state hosting several capable medical institutions that would be appropriate institutions for referral for a second opinion by an Infectious Disease Physician. Put directly, a second opinion from a University in Massachusetts does not follow TRICARE's procedures.

Further, a Service Member (SM) is not unequivocally allowed to direct whom they see for medical related issues. A SM may select a referral from possible options, but cannot direct that a particular Provider outside of the network, offer a second opinion under his or her TRICARE benefits. This is scientifically and medically unnecessary. AB [redacted] has consistently demonstrated laboratory and medical evidence of HIV infection under medically and scientifically accepted standards for HIV diagnosis since his first test collected 21 July 2011.

Finally, the defense's request for the blood draw states that it is to compare the results of their confidential test against AB [redacted]s medical records to determine whether AB [redacted] was validly diagnosed as HIV-1 infected. The request asks for the blood to be sent to the electron microscopy laboratory at the University of Massachusetts Medical School, Department of Cell and Developmental Biology. Electron micrographic studies are research techniques and are not accepted CLIA, DoD CLIP validated assays as an aid to diagnosis of HIV infection. Having participated in similar cases where OMSJ was employed, I can deduce that the defense seeks to conduct electron micrograph studies of AB [redacted]s plasma and present findings as proof that he is not infected with HIV. As per above, this approach is not a scientific, nor medically valid approach for diagnosis of HIV infection, nor is it not a FDA approved, CLIA, DoD CLIP validated methodology to aid in the diagnosis of HIV infection and should be refused.

Sheila A Peel, MSPH, PhD
Chief, Department of Laboratory Diagnostics and Monitoring
Laboratory Director, HIV Diagnostics & Reference Laboratory
US Military HIV Research Program (MHRP)
Walter Reed Army Institute of Research

State of Maryland, County of Montgomery.
Subscribed and sworn before me this 16th day of April 2013, by Patricia Lacey.

My Commission expires: Patricia C. Lacey. Commission expires 27-May-16.

From: [redacted]
[redacted]

Cc: [redacted]

Subject: [redacted] - scheduling order extensions/additions
Date: Thursday, April 18, 2013 11:17:38 AM

TC/DC -

As discussed in our 802 this morning, I amend my scheduling order as follows:

1) The 22 Apr 13 deadline for remaining defense motions is extended to 25 Apr 13.
2) The government responses deadline is extended to 29 Apr 13.
3) The discovery date for HIV testing materials to the defense is extended to 22 Apr 13. For items that both sides agree exist, are discoverable, and within the custody or control of the United States government, but have not been provided by 1630 Eastern on 22 Apr 13, the trial counsel will prepare a draft order for the court NLT 23 Apr 13 addressed by name /rank to the attention of the commanding officer or equivalent of the organization that maintains these documents.
4) By 23 Apr, the government will submit to the defense and the court, more specific terms of their verbal offer to test the blood of the accused if he provided a consent form to have his blood tested...including whether such test results would be confidential to the defense; where those tests would be performed (same lab/different lab/DoD or civilian); what testing protocols would be utilized; and how the proposed government testing differs from what the defense requests. By 25 Apr, the defense will respond to the government and court as to whether the accused is interested in signing such a consent form under the terms proposed by the government. These filings will be treated as supplements to the motion to compel a blood draw.

Thanks - Judge [redacted]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY

18 April 2013

MEMORANDUM FOR TRIAL COUNSEL

FROM: USAF Judiciary/ADC
1195 Cannon Avenue, Suite 226
Seymour Johnson AFB NC 27531

SUBJECT: Discovery Request (6th) – *United States v.* [redacted]

On 12 Apr 13, the government provided notice that it would retain Dr. Shiela Peel as a government expert. Pursuant to Rule for Courts-Martial 701 and other applicable law, the defense respectfully requests that the government provide it the following information

1. A copy of the transcript of Dr. Peel's testimony in every court-martial or civilian court case where Dr. Peel has testified. Affidavits, unsworn declaration, or letters that Dr. Peel has previously submitted in anticipation of litigation should also be provided. Dr. Peel indicates she has testified in *United States v. Pinkela*. In addition to the transcript of Dr. Peel's testimony for this case, please provide any associated government or defense motion referencing Dr. Peel's testimony and any order (either transcribed oral order or written opinion) of the military judge related to Dr. Peel's testimony.

2. Disclosure of all sources, to include specific statutory or regulatory citations for legal sources and journal or periodical references for scientific sources, relied upon by Dr. Peel to make the claims articulated in her affidavit, dated 16 Apr 13, if the source is not specifically cited to in her affidavit (*e.g.*, Dr. Peel cited to Wikipedia for some claims). For example, Dr. Peel makes certain claims about TriCare guidelines that are not supported by citation.

[redacted], Capt, USAF
Area Defense Counsel

CERTIFICATE OF SERVICE

I certify this discovery request was caused to be served on trial counsel on 18 Apr 12.

[redacted], Capt, USAF
Area Defense Counsel

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY (AFLOA)

22 April 2013

MEMORANDUM FOR DEFENSE COUNSEL (Capt [redacted]

FROM: AFLOA/JAJG (Capt Rosenow)

SUBJECT: Government Discovery Response, No. 6, in *U.S. v. AB* [redacted]

1. Pursuant to R.C.M. 701 and 703, the government hereby responds to the defense request for the discovery of evidence, dated 18 April 2013, and titled "Discovery Request (6th)":

    1. Denied. The government requests specific justification for this demand, including a statement of relevance and necessity. Moreover, the government requests specific explanation of (1) why Dr. Sheila Peel's availability for interview by the defense is insufficient to prepare for trial and (2) the basis for any belief the proposed evidence contains relevant and necessary material unavailable through interview and independent investigation. I note as of this writing the defense has neither accomplished nor scheduled any interview with Dr. Peel.

    2. Denied. The government directs the defense to Dr. Peel again, who can best answer the defense questions as well as its assertion her "claims about TriCare guidelines…are not supported by citation."

2. The government understands it has a continuing discovery obligation before, during and after trial of this case. If you have any questions, please contact me by telephone at 202.630.1254 or email through mark.rosenow@us.af.mil.

MARK F. ROSENOW, Capt, USAF
Trial Counsel

CERTIFICATE OF SERVICE

I certify that on 22 April 2013 I caused a copy of this document, Government Discovery Response, No. 6, to be served on the defense.

MARK F. ROSENOW, Capt, USAF
Trial Counsel

From: [redacted]

Subject: FW: Misuse of Core Electron Microscopy Facility
Date: Tuesday, April 23, 2013 9:54:29 AM
Attachments: CEMF Request.pdf

Capt [redacted] -

Per Capt [redacted] discovery request a few moments ago, please see the email communications below. Although it was not attached to the latest message, I have also included the original attachment with this email.

We have not heard anything back from Dr. Witman but will forward anything returned upon receipt. The government understands Capt [redacted] discovery request to be ongoing and extend to include any responsive documents provided to answer the concerns posed below.

Please let us know if you have any questions or need anything else.

V/R,

Capt Rosenow

_____

From: ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG
Sent: Monday, April 22, 2013 3:20 PM
To: Witman, George; Lawrence, Jeanne
Cc: Craig, Roger; markrosenow@outlook.com
Subject: RE: Misuse of Core Electron Microscopy Facility

Dr. Witman -

Sir, thank you for the help.

V/R,

Capt Rosenow

_____

From: Witman, George [George.Witman@umassmed.edu]
Sent: Monday, April 22, 2013 3:13 PM
To: Lawrence, Jeanne
Cc: ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG; Craig, Roger
Subject: RE: Misuse of Core Electron Microscopy Facility

Dear Jeanne,

I have received your email with message from Capt Mark Rosenow. I will get together with Roger and look into this matter. One of us will get back to you as soon as possible.

George

George B. Witman, Ph.D.

Professor of Cell and Developmental Biology

George F. Booth Chair in the Basic Sciences

University of Massachusetts Medical School

55 Lake Avenue North

Worcester, MA 01655

Tel: [redacted]

Fax: 5[redacted]

e-mail: [redacted]

From: Lawrence, Jeanne
Sent: Monday, April 22, 2013 4:07 PM
To: Witman, George; Craig, Roger
Cc: mark.rosenow@us.af.mil
Subject: FW: Misuse of Core Electron Microscopy Facility

Dear George and Roger,

Please find the message below from Capt Mark Rosenow which raises the issue of whether the UMMS EM Core Facility has done HIV testing of human blood samples for purposes that may be unlawful. I called Capt Rosenow and got permission to forward this message to the two of you, as Directors of the EM Facility. He preferred that you be contacted first and that it may not be necessary to involve Greg Hendricks (Facility Manager), but that you could do so if you feel it is necessary to resolve the issue. I have copied Capt Rosenow above, and his phone number is listed below, so you can follow-up with questions or information directly to him.

Please respond to let me know that you have seen this e-mail and will follow-up to resolve whatever the questions are, and let me know if my assistance is needed or if the matter is resolved.

Thank you,

Jeanne Lawrence, PhD

Professor and Interim Chair of Cell and Developmental Biology

From: ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG [mailto:mark.rosenow@us.af.mil]
Sent: Monday, April 22, 2013 12:27 PM
To: Lawrence, Jeanne
Cc: WRIGHT, LECIA E Capt USAF 4 FIGHTER WG/JAD; markrosenow@outlook.com
Subject: Misuse of Core Electron Microscopy Facility

Dr. Lawrence -

Ma'am, my name is Capt Mark Rosenow and I am a senior prosecutor for the United States Air Force. As part of my duties, I have been detailed to represent the United States in an upcoming court-martial involving allegations that an Air Force member assaulted three partners by engaging in unprotected sexual acts without informing them of his HIV infection.

In the course of preparing for trial, I have learned that the Core Electron Microscopy Facility may have been employed in the past to accomplish HIV testing of human blood samples for treatment or diagnostic purposes. My understanding is that these tests would have been made on the request of the Office of Medical and Scientific Justice (http://www.omsj.org/innocence-group), an organization dedicated in this context to denying the link between HIV and AIDS and challenging the adequacy of FDA-licensed HIV testing. Additionally, it is my understanding that your laboratory cannot lawfully accomplish electron microscope testing for the abovementioned purposes as it is not a CLIA or DoD CLIP-approved laboratory.

I have contact information for the Chancellor of the School of Medicine and other senior staff at the University but thought I should contact you first. Please know this is a time-sensitive request and I hope to hear from you soon. The defense in the trial I am prosecuting has asked the military judge to order a blood draw so that it can be sent to be analyzed by your microscope; we have opposed this request, however, and part of the reason is our belief the testing of human blood samples for HIV diagnosis and treatment purposes at your facility is unlawful. If we are mistaken in any way about the certifications for or testing permissible at your laboratory, I am hopeful you can clear up the confusion.

Finally, I note that Dr. Gregory Hendricks is listed on the request as the contact for your laboratory (see attached). I do not know whether he has served as the contact for OMSJ in the past or accomplished testing for OMSJ in the manner described above. I also do not know whether he was aware of the purpose of their request for testing or of the legal constraints limiting your laboratory's testing of human blood samples for HIV diagnosis and treatment. For those reasons, I have contacted you directly rather than him.

I called your office (508.856.6015) a few times this morning to no avail but remain free all day today and tomorrow. My cell phone number is below and I look forward to your call. Thank you.

V/R,

MARK F. ROSENOW, Capt, USAF
Senior Trial Counsel

61 Main Circle, Suite 1
Randolph AFB, TX 78150-4544
Tel: 202.630.1254

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AFFIDAVIT OF CLARK BAKER

I, CLARK BAKER, do hereby make the following sworn declaration. All matters contained herein are of my own personal knowledge unless stated as based upon information and belief:

1. I am a US citizen and resident of Los Angeles County, California. I am a retired member of the Los Angeles Police Department. I have conducted thousands of criminal and civil investigations since 1980.

2. I am the Director and Founder of Office of Medical & Scientific Justice (OMSJ), a Los Angeles-based 501c3 non-profit corporation and a licensed investigation agency.[1] Since 2009, OMSJ has helped attorneys in jurisdictions throughout the United States.

3. OMSJ manages and directs experts in a variety of civil, criminal, military, governmental, and other investigations across the US and Europe. These cases include the case of *United States v.* [redacted]

4. Since 2012, OMSJ has worked with Prof. Gregory Hendricks PhD of the University of Massachusetts (U. Mass) on a number of cases and studies. Dr. Hendricks is an expert in the field of electron microscopy (EM), which involves the use of electron microscopes to observe objects too small to see with the naked eye or light microscopes.

5. An example of the type of reports Dr. Hendricks has prepared in past cases is attached hereto as EXHIBIT 1. Dr. Hendricks was retained to prepare a similar type of report in the present case. Dr. Hendricks had agreed to be available for trial and the motions hearings in this case, both telephonically and in person if required.

6. On 22 April 2013, Trial Counsel in *United States v.* [redacted] contacted Jeanne Lawrence PhD, Chair and Professor of Cell and Developmental Biology at the U. Mass Medical School, alleging that Hendricks may have used his position at the

[1] www.OMSJ.org

Core Electron Microscopy Facility "to accomplish HIV testing of human blood samples for treatment or diagnostic purposes." This assertion is false. Dr. Hendricks has prepared research reports for cases where OMSJ has been retained or is serving pro bono as an investigative consultant. These reports are used not for treatment or diagnostic purposes, but rather to present relevant evidence in pending investigations.

7. As an investigative agency, OMSJ contracts with Dr. Hendricks to help us establish facts related to our civil and criminal cases. Dr. Hendricks simply reports to us what he sees and does not see in blood samples. He does not diagnose patients.

8. As a result of Trial Counsel's action, Dr. Hendricks' superiors initiated a series of emails, threats and unknown administrative actions. On April 23 at 5:01AM, Dr. Hendricks reported that he cannot assist us with any of OMSJ's current active criminal, civil and experimental projects until the matter was resolved. Dr. Hendricks reported that this decision was because of an investigation that an Air Force JAG officer had triggered with false allegations about his conduct. When I called his office to inquire further, Dr. Hendricks avoided my call and replied in an email that he was "dealing with the shit storm" and was "all lawyered up…" (EXHIBIT 2)

9. Actions by trial counsel has harmed the defense in *United States v.* [redacted] because the Defendant's chosen expert is now unavailable do to the actions of trial counsel. Additionally, the actions of trial counsel many have irreparably harmed OMSJ's ability to effectively defend dozens of other active criminal and civil cases across the US and England.

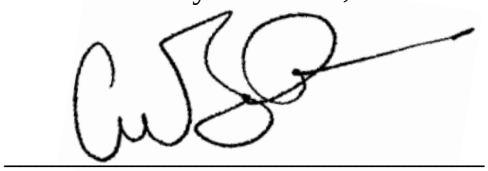
10. Trial Counsel's actions have also harmed OMSJ's relationship with Dr. Hendricks and U. Mass in other matters that include an ongoing project that reveals problems with current biological testing devices and laboratories throughout the US.

11. The harm done by Trial Counsel's actions cannot be overstated. Aside from the fact that he contacted employers to dissuade that witness from participating in the defense of OMSJ's current and future criminal defendants and civil parties, OMSJ's relationship with U. Mass and Dr. Hendricks may be irreparably harmed in such a way that could dissuade him from assisting in OMSJ's other current and future forensic projects.

12. Unless remedied, Dr. Hendricks may lose his job and career due to the distorted facts transmitted by Trial Counsel, to Dr. Hendricks' employer, whether those distortions were made purposefully or due to a lack of understanding of medical terminology. Despite his many years of service at U. Mass, university administrators who rely upon governmental (NIH) and pharmaceutical funding are often reluctant to retain untenured employees who create "administrative headaches." If U. Mass decides not to renew Dr. Hendricks' contact, it is unlikely that he would find work as an electron microscopist again.

I, CLARK BAKER, do hereby swear under penalty of perjury under the laws of the State of North Carolina that the foregoing, consisting of THREE OF THREE pages is true and correct.

Executed this TWENTY-SIXTH day of APRIL, 2013 in LOS ANGELES, California.



CLARK BAKER

EXHIBITS

EXHIBIT 1

AFFIDAVIT OF GREGORY HENDRICKS PHD

I, GREGORY HENDRICKS PhD do hereby make the following sworn declaration. All matters contained herein are of my own personal knowledge unless stated as based upon information and belief:

1. I have never been called to testify as an expert in any state or federal court. I have never been found guilty of fraud or perjury. A copy of my curriculum vitae is attached hereto as ATTACHMENT 1, which outlines my education, training and background.

2. I am currently an Associate Professor in the Department of Cell and Developmental Biology at the University of Massachusetts (U. Mass) Medical School. I have more than 35 years of experience in biological and materials electron microscopy and specimen preparation. I teach an introductory course in the Principles and Techniques of Biological Electron Microscopy as an adjunct professor during fall semester at Stone Hill College in Easton, Ma. I also teach a graduate-level course at the Medical School to our graduate and medical students on electron microscopy and digital light microscopy techniques. I have written extensively on the subject of microscopy of biological and materials preparation and analysis. I have been invited to co-author several recent books on the preparation and analysis of viral specimens for electron microscopy (Hendricks, G.M. and Gao, G. (2011) Protocol 14: Negative Staining of AAV vector samples for high-resolution electron microscopy, In: Molecular Cloning, Vol 3, Cold Spring Harbor Press; Hendricks, G. (2012) Metal Shadowing for Electron Microscopy, Chapter 4, In: Electron Microscopy: Methods and Protocols, Third Edition, edited by Dr. John Kuo, Humana Press, Springer) and I am an active reviewer for many national and international Journal editorial review boards. (see CV, ATTACHMENT I)

3. In 1978, I received my Bachelor's Degree in Engineering and Applied Sciences from the Arizona State University (ASU) College of Engineering. In 1976, I became the first undergrad to enroll in the graduate-level electron microscopy (EM) course.

The technology had only become commercially available in the 1960's and ASU installed their first instrument in 1972. At the time, no one except respected researchers and their graduate students were allowed access to the instrument. While continuing graduate training at ASU in physiology, I worked at numerous Phoenix-area engineering firms designing and testing electronic components, including electron microscopy, for quality assurance.

4. In 1982, ASU recruited me into an Associate Research Specialist position where I became the principle Electron Microscopist for the Department of Zoology. In this capacity, I provided technical assistance in all areas of electron microscopy, specimen preparation and detailed histological studies to the departmental faculty members and continued my own training in newly emerging techniques in electron microscopy. In 1983, I earned a Master's degree in Physiology from ASU.

5. In 1986, I was recruited by the University of Vermont, Department of Anatomy and Neurobiology to serve as the Research Facility Coordinator and manage the newly created Core Electron Microscopy Facility. In this capacity, I was responsible for building the core facility, acquiring new instruments and training users. I taught a two-semester course on the Theory and Principles of Biological Electron Microscopy while continuing my own education, which included a five-week summer course in Intermediate and High Voltage Electron Microscopy at the Keith Porter Center for HVEM, Boulder, Co. (1986); Techniques in Immuno-Electron Microscopy and Cytochemistry at the Harvard School of Medicine, Boston, Ma. (Spring 1989); Techniques in Cryopreparation and Immunogold labeling for Electron Microscopy at the Harvard School of Medicine, Boston, Ma. (Spring 1990); Techniques in Laser Scanning Confocal Microscopy at Noran Instruments, Middleton, WI (Spring 1996); and the following year I returned to Noran Instruments to attend an advanced course in Laser Scanning Confocal Microscopy (Spring 1997).

6. In 1998, I completed my doctorate training at the University of Vermont School of Medicine in Nutrition and Food Sciences - in the study of Nutritional Biochemistry.

That same year, I was recruited to the University of Massachusetts (U Mass) Medical School to build a university-wide Core Electron Microscopy Facility, modeled on the work I had completed at the University of Vermont. In 2000, I returned to the University of Vermont and successfully defended my Doctorate Dissertation and was awarded my Doctorate of Philosophy in Nutritional Biochemistry. I have remained at the University of Massachusetts Medical School ever since; establishing and running one of the most successful microscopy facilities on the East Coast.

7. An electron microscope (EM) is a type of microscope that uses an electron beam to illuminate a specimen and produce a magnified image. EM has greater resolving power than a light optical microscope and can reveal the structure of smaller objects because electrons have wavelengths about 100,000 times shorter than visible light photons. They can achieve better than 50 pm resolution and magnifications of up to about 10,000,000x whereas ordinary, non-confocal light microscopes are limited by diffraction to about 200 nm resolution and useful magnifications below 2000x. EM uses electrostatic and electromagnetic lenses to control the electron beam and focus it to form an image. These electron optical lenses are analogous to the glass lenses of a light optical microscope. Electron microscopes are used to investigate the ultrastructure of a wide range of biological and inorganic specimens including microorganisms, cells, large molecules, biopsy samples, metals, and crystals. Industrially, the electron microscope is often used for quality control and failure analysis. Modern electron microscopes produce electron micrographs, using specialized digital cameras or frame grabbers to capture the image.

8. In its original form, the transmission electron microscope (TEM), uses a high voltage electron beam to create an image. The electron beam is produced by an electron gun, commonly fitted with a tungsten filament cathode as the electron source. The electron beam is accelerated by an anode typically at +100 keV (40 to 400 keV) with respect to the cathode, focused by electrostatic and electromagnetic lenses, and transmitted through the specimen that is in part transparent to electrons and in part

scatters them out of the beam. When it emerges from the specimen, the electron beam carries information about the structure of the specimen that is magnified by the objective lens system of the microscope. The spatial variation in this information (the "image") may be viewed by projecting the magnified electron image onto a fluorescent viewing screen coated with a phosphor or scintillator material such as zinc sulfide. Alternatively, the image can be photographically recorded by exposing a photographic film or plate directly to the electron beam, or a high-resolution phosphor may be coupled by means of a lens optical system or a fiber optic light-guide to the sensor of a CCD (charge-coupled device) camera. The image detected by the CCD may be displayed on a monitor or computer. TEM requires extremely thin sections of the specimens, typically about 100 nanometers. Biological specimens typically need to be chemically fixed, dehydrated and embedded in a polymer resin to stabilize them sufficiently to allow ultrathin sectioning. Sections of biological specimens, organic polymers and similar materials may require special “staining” with heavy atom labels in order to achieve the required image contrast. Other EM devices include the Scanning electron microscope (SEM), Reflection electron microscope (REM), Scanning transmission electron microscope (STEM), and Low-voltage electron microscope (LVEM). I have routinely provided TEM analysis to examine thousands of pathogens.

[redacted]

9. On Wednesday afternoon, 20 February 2013, I received one sample of human blood plasma from Federal Express at the U. Mass Core Electron Microscopy Facility. The package appeared to be intact and the seals unbroken. The sample was marked as [redacted] and the fresh plasma was stored and shipped on wet ice. I placed the sample in the laboratory refrigerator until Thursday morning.

10. On 21 February, 2013, I transferred a 1 ml aliquot of the sample to a microfuge tube and centrifuged to pellet the cell debris and clean the plasma. Following the

centrifugation, I took a 10 µl aliquot of the supernatant and applied it onto a freshly prepared carbon stabilized formvar support grid and negative stained the sample with 1% unaryl acetate, air dried and examined it on a Philips CM 10 at 80Kv accelerating voltage and imaged the sample using a Gatan fast scan digital camera (accompanying micrographs). Because the original plasma sample was concentrated, I also ran samples of the plasma after dilution (1:10) in 100 mM ammonium acetate.

11. I observed that the undiluted plasma sample was full of what appears to be protein aggregates and a few lipid vesicles; so much so that individual particles could not be resolved easily (see image TM300113 con. 46 KX a). After diluting the original blood plasma 1:10 with 100 mM Ammonium Acetate, the protein aggregates and small lipid vesicles were easily resolved when observed at 46,000X and 92000X.

12. I found no evidence of Human Immunodeficiency Virus (HIV) or any other virus-like particles in the sample received and recorded images of the samples at 46,000X and at 92,000X. Based upon the aforementioned facts as well as my training and expertise, I found no evidence that can be reasonably used to conclude with any degree of scientific or clinical certainty that the Defendant's blood/plasma is infected with what is known as "Human Immunodeficiency Virus" (HIV).

I, GREGORY HENDRICKS, do hereby swear under penalty of perjury under the laws of the State of Massachusetts that the foregoing, consisting of FIVE of FIVE pages is true and correct.

Executed this FOURTH day of MARCH, 2013 in WORCHESTER, MASSACHUSETTS.

GREGORY HENDRICKS PH.D.

EXHIBIT 2

From: Hendricks, Gregory [mailto[redacted]
Sent: Tuesday, April 23, 2013 9:50 AM
To: Clark Baker
Subject: RE: phone Daubert hearing May 3

Not at lunch; dealing with the shit storm.
Thank you Clark, I appreciate your efforts in this matter.
I'm all lawyered up here now so I can't discuss this any further.
Thanks again
Greg

From: [redacted] Capt USAF AETC AETC/AFLOA/JAJG
To: [redacted]
Cc: [redacted] Capt USAF AFLOA AFLOA/ADC; [redacted]; [redacted] Capt USAF AFLOA ADC/ADC; [redacted]; [redacted] Capt USAF ACC 4 FW/JAD; [redacted]
Subject: RE: contact info
Date: Tuesday, April 23, 2013 8:09:47 PM

Mr. Healy -

Sir, thanks again for the call back. All members of the defense are copied above along with the prosecution. If you wish to speak with the defense exclusively, please use the following addresses: [redacted]1@us.af.mil; [redacted]@gmail.com; [redacted]@seymourjohnson.af.mil; baron@hubbardcoleman.com.

As discussed this afternoon, the government is writing for information related to the following questions:

[1] Is the laboratory discussed in the proposed defense request for testing a CLIA or DoD CLIP-approved laboratory?
[2] If the laboratory is so approved, can the laboratory accomplish the human blood sample testing proposed by the defense (electron micrographic study) to aid in the diagnosis of an HIV infection?
[3] If the laboratory is not so approved, can the laboratory accomplish the human blood sample testing proposed by the defense (electron micrographic study) to aid in the diagnosis of an HIV infection?

As stated in my original letter to Dr. Lawrence, if we are mistaken in any way about the certifications for or testing permissible at your laboratory, I am hopeful you can clear up the confusion.

Thanks once more and please call or write if you need anything else.

V/R,

MARK F. ROSENOW, Capt, USAF
Senior Trial Counsel
61 Main Circle, Suite 1
Randolph AFB, TX 78150-4544
Tel: 202.630.1254

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From: Healy, James [James.Healy@umassmed.edu]
Sent: Tuesday, April 23, 2013 12:38 PM
To: ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG
Subject: FW: contact info

Again

James G. Healy, J.D.

Associate Vice Chancellor for Management

University of Massachusetts Medical School

55 Lake Avenue North

Worcester MA 01655

james.healy@umassmed.edu

(ph) 5[redacted]

(fx) 508[redacted]

From: Healy, James
Sent: Tuesday, April 23, 2013 1:37 PM
To: 'mark.rosenow@us.af.mil'
Subject: contact info

This is me.

James G. Healy, J.D.

Associate Vice Chancellor for Management

University of Massachusetts Medical School

55 Lake Avenue North

Worcester MA 01655

[redacted]

(ph) [redacted]

(fx) 5[redacted]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY

23 April 2013

MEMORANDUM FOR TRIAL COUNSEL

FROM: USAF Judiciary/ADC
1195 Cannon Avenue, Suite 226
Seymour Johnson AFB NC 27531

SUBJECT: Discovery Request (7th) – *United States v.* [redacted]

Background: On 22 Apr 13, the government emailed Jeanne Lawrence, Ph.D., Professor and Interim Chair of Cell and Developmental Biology, University of Massachusetts, that the UMASS "Core Electron Microscopy Facility may have been employed in the past to accomplish HIV testing of human blood samples for treatment or diagnostic purposes." The subject of this email was entitled "Misuse of Core Electron Microscopy Facility." The government represented to Dr. Lawrence that its facility "cannot lawfully accomplish electron microscope testing for the abovementioned purposes as it is not a CLIA or DOD CLIP-approved laboratory." The defense respectfully requests that the government answer the following questions and provide any documents in discovery related to the above-referenced inquiry:

1. What was the basis for the government's assertion that testing was performed "for treatment or diagnostic purposes"? Please provide statements, notes, emails, and any correspondence between the government and all individuals it corresponded with to form the basis for this assertion. Where the basis was formed through conversation, please provide a reasonable summary of the conversation, the date that it occurred, and the parties present.

2. What was the basis for the the government's assertion that past testing was unlawful? Please provide a reference to any statutory or regulatory citations, or other relevant authority, which assisted the government in forming the basis for this allegation. Please provide statements, notes, emails, and any correspondence between the government and all individuals it corresponded with to form the basis for this assertion. Where the basis was formed through conversation, please provide a reasonable summary of the conversation, the date that it occurred, and the parties present.

3. Finally, please detail which government officials, representatives, and/or agents were involved in crafting and approving the email sent to Dr. Lawrence, as well as the rationale behind its transmission to include any related statements, notes, emails, and other correspondence.

[redacted], Capt, USAF
Area Defense Counsel

CERTIFICATE OF SERVICE

I certify this discovery request was caused to be served on trial counsel on 23 Apr 13.

[redacted], Capt, USAF
Area Defense Counsel

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY (AFLOA)

25 April 2013

MEMORANDUM FOR DEFENSE COUNSEL (Capt [redacted]

FROM: AFLOA/JAJG (Capt Rosenow)

SUBJECT: Government Discovery Response, No. 7, in *U.S. v. AB* [redacted]

1. Pursuant to R.C.M. 701 and 703, the government hereby responds to the defense request for the discovery of evidence, dated 23 April 2013, and titled "Discovery Request (7th)". First, however, we note the defense misreads the email referenced in their discovery request as containing any positive assertion or allegation previous testing was done for an unlawful purpose (*See, e.g.*, "the Core Electron Microscopy Facility may have been employed in the past", "My understanding is that", "it is my understanding", "I do not know whether", "I also do not know whether" and "If we are mistaken in any way about the certifications for or testing permissible at your laboratory, I am hopeful you can clear up the confusion"). Instead, the email sent to Dr. Jeanne Lawrence contained questions related to potential misuse of the laboratory in the past and potential misuse in this court-martial if the defense motion to compel a blood draw is granted.[1]

   Returning to the present defense discovery request:

   1. Denied in part. Most of the information requested by the defense is protected as attorney work product, but all written communication with Dr. Sheila Peel responsive to the defense request is attached. We note, as an anticipated witness, Dr. Peel remains available for interview by the defense.

      That said, statements from defense counsel in the abovementioned case as well as defense filings with this court-martial *by themselves* form a basis for the concern testing may have been done for treatment or diagnostic purposes in the past.

      a. "[The Office of Medical and Scientific Justice's (OMSJ)] HIV Innocence Group (HIG) has successfully assisted in dozens of HIV-related cases since October 2009. We have assisted in several military cases, although to date our assistance has primarily been used by the Marine Corps, Navy and Army." Letter from Mr. Clark Baker, dated 2 April 2013 (available in *Defense Motion* at p. 25).

[1] This distinction is highlighted again in the email trial counsel sent to Dr. James Healy on 23 April 2013 before the defense requested the government refrain from contacting anyone at the University of Massachusetts Medical School: "As stated in my original letter to Dr. Lawrence, if we are mistaken in any way about the certifications for or testing permissible at your laboratory, I am hopeful you can clear up the confusion." Email from Capt M. Rosenow, dated 23 April 2013.

b. And later in that same letter: "OMSJ assists the military accused by…performing our own independent testing when appropriate…" *Defense Motion* at p. 25.

c. "Since 2009, OMSJ's team of experts has provided medical, legal and scientific support to scores of attorneys such as Capt [redacted] Based on OMSJ's preliminary review of the government's evidence, we believe that the consultation of …Gregory Hendricks Ph.D.…is necessary for an adequate defense of the charges." *Id.* at p. 26.

d. "He designed and built the core electron microscopy facilities at UV and U. Mass. Dr. Hendricks has examined and photographed thousands of images of HIV since the 1980s and is expected to examine AB [redacted] plasma for visible evidence of HIV infection." *Id.* at p. 26.

e. "As OMSJ has successfully demonstrated relevance and materiality of this testing procedure in various judicial proceedings, we are confident we will prevail [on the defense motion to compel a blood draw]." Email from Capt [redacted] dated 16 April 2013.

f. In a phone call with trial counsel on 17 April 2013, Capt [redacted] stated these types of tests had been accomplished in several trials before and was confident the military judge would direct the blood draw. He further stated this was an issue of admissibility not discovery.

g. In an R.C.M. 802 conference on 18 April 2013, Mr. G. Baron Coleman stated these particular tests had been accomplished and used in multiple trials by OMSJ in the past.

h. After Dr. Lawrence was contacted, in a phone call with trial counsel and assistant trial counsel on 23 April 2013, Capt [redacted] stated OMSJ had a longstanding relationship with the Core Electron Microscopy Facility.

Moreover, given the admitted reliance of military defense counsel in this case upon the experience of OMSJ and Mr. Coleman,[2] a straightforward inference is that the assistance described in all those proceedings above is the same sought in the present court-martial as it relates to a diagnostic blood draw for electron micrograph study. This inference is confirmed by the "Clinician Request" template attached to the defense motion to compel a blood draw. *See Defense Motion* at p. 5. Indeed, the same sources recounted above *by themselves* support the conclusion the defense motion to compel a blood draw aims to collect AB [redacted] blood for the purpose of diagnosis.

i. "The defense contacted the chief of medical staff, Lt Col [redacted], and explained the purpose of the request, and indicated our belief that ordering the

[2] *See, e.g.*, Request for Confidential Expert Consultant in Forensic Medicine, dated 29 March 2013 ("Undersigned counsel has not tried an HIV-related aggravated assault.").

test would be authorized under TriCare procedures that allow a patient to request a 'second opinion' of a medical diagnosis." *Defense Motion* at para. 5.

j. "In the course of this preparation, our expert consultants have recommended a blood draw to be taken in order to compare the results against AB [redacted] medical records to determine, *inter alia*, whether AB [redacted] was validly diagnosed as HIV positive." *Id.* at para. 11.

k. "I have been informed that I am 'HIV+.' Because of my uncertainty (and the seriousness) of this claim, I respectfully request that you order a twenty (20) ml blood draw…" *Defense Motion*, "Clinician Request" at p. 5.

2. Denied in part. Most of the information requested by the defense is protected as attorney work product and no written communication with Dr. Peel responsive to the defense request exists. We refer the defense to Government Discovery Response, No. 6, and state one more time Dr. Peel is available for interview to discuss her affidavit, dated 16 April 2013, attached to the government response to the defense motion. We also note here again the defense misreads the email referenced in their discovery request as containing a positive assertion or allegation previous testing was done for an unlawful purpose.

That said, the government directs the defense to at least the following laws and regulations, which combined with the statements of defense counsel and defense filings form a basis for the concern similar past testing and that proposed in the defense motion to compel a blood draw was or would be unlawful.

a. The Public Health Service Act, particularly 42 U.S.C. § 263a

b. The Clinical Laboratory Improvement Amendments of 1988 (CLIA), particularly 42 C.F.R. §§ 493.1-493.3

c. DoD Instruction 6440.2, Clinical Laboratory Improvement Program (CLIP), dated 20 April 1994

d. AFIP Pamphlet No. 40-24, Technical Instructions for the DoD Clinical Laboratory Improvement Program, dated 1 September 2007

e. AFI 48-135, *Human Immunodeficiency Virus Program*, certified 13 May 2010

3. Denied in part. Most of the information requested by the defense is protected as attorney work product. That said, I wrote the email alone with the hope of clarifying a legal issue presented to the court by the defense motion to compel a blood draw: if the Core Electron Microscopy Facility is not CLIA or DoD CLIP-approved (and not somehow exempted from those regulations), can it lawfully accomplish the human blood sample testing proposed by the defense (electron micrograph study) to aid in the diagnosis of an HIV infection?

2. The government understands it has a continuing discovery obligation before, during and after trial of this case. If you have any questions, please contact me by telephone at 202.630.1254 or email through mark.rosenow@us.af.mil.

MARK F. ROSENOW, Capt, USAF
Trial Counsel

Attachment: Email from Capt M. Rosenow, dated 22 April 2013 (2 pp.)

CERTIFICATE OF SERVICE

I certify that on 25 April 2013 I caused a copy of this document, Government Discovery Response, No. 7, and its attachment to be served on the defense.

MARK F. ROSENOW, Capt, USAF
Trial Counsel

RE: Contact Info

From: **ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG** (mark.rosenow@us.af.mil) You moved this message to its current location.
Sent: Mon 4/22/13 12:01 PM
To: speel@hivresearch.org (speel@hivresearch.org)
Cc: [redacted] Capt USAF ACC 4 FW/JAD ([redacted]@seymourjohnson.af.mil); Mark Rosenow (markrosenow@outlook.com)

Dr. Peel -

Ma'am, thanks. I sent an email a minute ago and will let you know what we get back.

V/R,

Capt Rosenow

From: speel@hivresearch.org [speel@hivresearch.org]
Sent: Monday, April 22, 2013 10:00 AM
To: ROSENOW, MARK F Capt USAF AETC AETC/AFLOA/JAJG
Cc: Wright, Lecia E Capt USAF ACC 4 FW/JAD; Mark Rosenow
Subject: Contact Info

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